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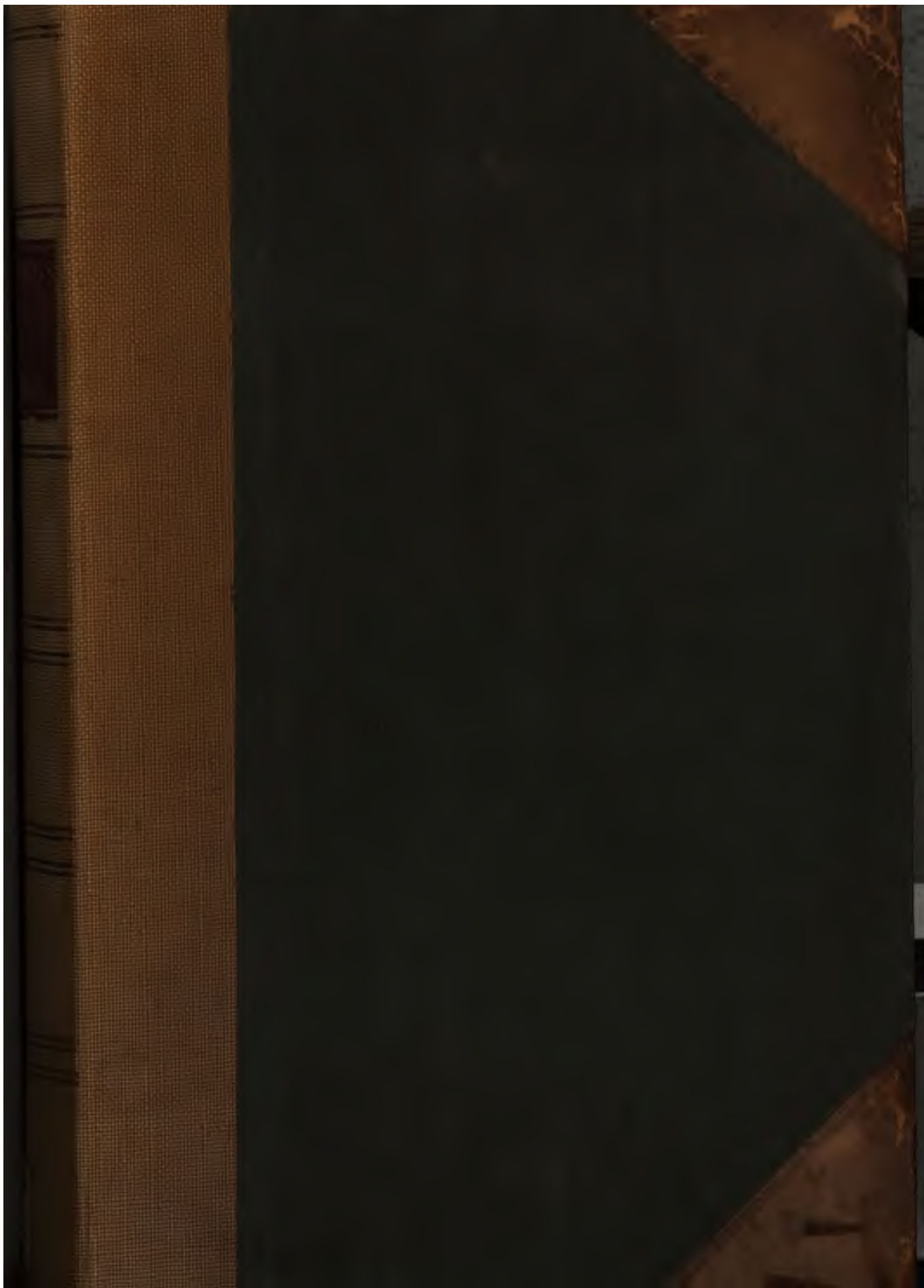
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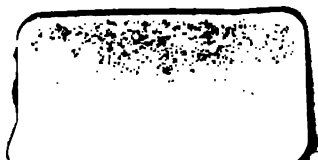
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**R E P O R T S**  
OF  
**C A S E S**  
*HEARD AND DECIDED IN THE*  
**H O U S E O F L O R D S**  
ON  
**A P P E A L S A N D W R I T S O F E R R O R ,**  
DURING THE SESSIONS  
**1834, 1835, & 1836.**

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**By C. CLARK AND W. FINNELLY, Esqrs.**  
BARRISTERS AT LAW.

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**VOL. III.**

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*LONDON:*  
**W. T. CLARKE,**  
LAW BOOKSELLER AND PUBLISHER,  
PORTUGAL-STREET, LINCOLN'S-INN.

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**1838.**



**CHIEF JUDGES AND LAW OFFICERS  
DURING THE PERIOD OF THESE REPORTS.**

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*Lord Chancellor:* { LORD LYNDHURST.  
LORD COTTENHAM.

*Lords Commissioners of the  
Great Seal:* { SIR C. C. PEPYS.  
SIR LAUNCELOT SHADWELL.  
SIR J. B. BOSANQUET.

*Master of the Rolls:* { SIR C. C. PEPYS.  
LORD LANGDALE.

*Vice Chancellor:*  
SIR LAUNCELOT SHADWELL.

*Lord Chief Justice of the Court of King's Bench:*  
LORD DENMAN.

*Lord Chief Justice of the Court of Common Pleas:*  
Right Hon. SIR N. C. TINDAL.

*Lord Chief Baron of the Court of Exchequer:*  
LORD ABINGER.

*Attorney General:* { SIR JOHN CAMPBELL.  
SIR F. POLLOCK.  
SIR JOHN CAMPBELL.

*Solicitor General:* { R. M. ROLFE, Esq.  
SIR WILLIAM FOLLETT.  
SIR R. M. ROLFE.

*Lord Advocate:* { A. MURRAY, Esq.  
SIR WILLIAM RAE.  
A. MURRAY, Esq.

*Lord Chancellor of Ireland:* { SIR EDWARD SUGDEN.  
LORD PLUNKETT.

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LONDON:  
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near Lincoln's Inn Fields.

## MEMORANDA.

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On the 16th of January 1836, the Lords Commissioners resigned the Great Seal, which was thereupon delivered by His Majesty to Sir Charles Christopher Pepys, Master of the Rolls, who, on the 19th of January, was sworn into office, and took his seat as Lord High Chancellor. His Lordship was shortly afterwards raised to the dignity of the peerage, by the stile and title of Baron Cottenham, of Cottenham, in the county of Cambridge.

At the same time Henry Bickersteth, Esq., one of His Majesty's Counsel, was appointed to the office of Master of the Rolls, vacant by the promotion of Sir C. C. Pepys, and was shortly afterwards raised to the dignity of the peerage, by the stile and title of Baron Langdale, of Langdale, in the county of Westmoreland. His Lordship was sworn into office on the same day with the Lord Chancellor, in the Lord Chancellor's Court at Westminster, and on the same day took his seat in the Rolls Court there. They were both introduced in the House of Lords on the 4th of February.

## ORDER

RELATING TO THE TAXATION OF COSTS.

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*Die Veneris, 3<sup>o</sup> Aprilis 1835.*

ORDERED,

THAT in all cases in which this House shall make any order for payment of costs by any party or parties in any appeal or writ of error, without specifying the amount, the clerk of the Parliaments or clerk assistant shall, upon the application of either party, proceed for the taxation of such costs in such manner as is directed by an Act passed in the 7th & 8th year of the reign of his late Majesty King George 4, entitled "An Act to establish a Taxation of Costs on Private Bills in the House of Lords," and shall give a certificate thereof expressing the amount of such costs. And it is further ordered, That the same fees shall be demanded from and paid by the party applying for such taxation for and in respect thereof, as are now or shall be fixed by any resolution of this House concerning fees, made or passed in pursuance of the said Act and in relation thereto; and the said clerk of the Parliaments or clerk assistant may, if he thinks fit, either add or deduct the whole or a part of such fees at the foot of his certificate, and the account of money certified by him after such addition or deduction (if any) shall be the sum to be demanded or paid under or by virtue of such order as aforesaid for payment of costs.

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1834.

HEARD IN THE

HOUSE OF LORDS,

ON APPEALS AND WRITS OF ERROR.

---

## APPEAL

April 12 & 14.

FROM THE EXCHEQUER IN EQUITY.

Lord GRAVES *v.* FISHER, Clerk.

Evidence of a payment in lieu of tithes was given, extending as far back as the reign of Charles 1. Still more ancient documents relating to the same parish, and among them the Ecclesiastical Survey of Henry 8, made no mention of such payment. Held, that under these circumstances, an allegation that such payment existed before the time of legal memory, was not supported.

---

THE Respondent filed his bill in the year 1814, for an account and payment of tithes, upon lands occupied by the Appellant, within the Respondent's rectory of Farrington, in the county of Devon. The Appellant in his answer admitted the legal title of the Respondent as rector, and his general right to all tithes arising within the rectory, but he alleged that the lands he occupied were demesne lands of the manor of Clist; that there had been, before the time of legal memory, an ancient customary payment of 2*l.* 6*s.* 8*d.*, payable at Midsummer in each year, by the owners and occupiers of the said lands, to the rector of the said rectory for the time being, and accepted by him in lieu of all tithes arising upon the said lands; and for that reason neither the Appellant nor the former owners and occupiers of the said lands had ever set out the tithes, or paid any composition for the same. In order to support the alleged modus,

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the Appellant produced a lease of the 16th October, in the eighth year of the reign of Charles 1st, reciting that there had been, and then was, a certain yearly sum or pension, yearly paid to the incumbent of the parish church for the time being, in lieu of all tithes of the lands therein described, including the lands occupied by the Appellant. He further proved by entries in the parochial and rector's books, by receipts, and by the testimony of witnesses, that a sum of 2*l.* 9*s.* 6*d.*, had been for a great many years yearly paid to and accepted by the rector for the time being, in lieu of all tithes of these lands.

It was objected that the *modus* as alleged, varied from the *modus* as proved, but the difference between them was attempted to be explained by calling evidence to show that the 3 *s.* additional had been specially paid for the repairs of the chancel. The evidence on this point was however quite inconclusive. The Respondent, with a view of showing that the payment set up by the Appellant could not have existed before the time of legal memory, produced, among other evidence in the cause, two instruments from the registry of the Bishop of Exeter, one entitled *Annexio Ecclesiarum de Clist Formison et de Farndon*, dated the 28th of September 1321, and purporting to be an ordinance of Walter Stapylton, then Bishop of Exeter; the other was an ordinance of John Grandison, also Bishop of Exeter, dated September 29th, 1366, and in these no money payment of the kind insisted on by the Appellant was mentioned. The Respondent relied on these ordinances, and on the Ecclesiastical Survey of the 26th Henry 8th, for the purpose of showing that the alleged ancient customary payment was not recognised at the period of their respective dates.

Lord Chief Baron (Sir *William Alexander*), after hearing the case very elaborately argued (*a*), decreed

(*a*) M'Clel. & Youngc, 362.

for an account of the tithes, observing that a careful examination of the evidence forced on his mind a conviction, that in the 13th and 14th centuries the modus alleged was not payable as of right, and that its origin must therefore have been subsequent to the time of legal memory; under the particular circumstances of the case, he directed the account to be confined to six years before the filing of the bill.

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Mr. *Bickersteth* and Mr. *Jacob* for the Appellant:—  
 A payment in money proved to have been so long in existence, must have had a legal origin. The mere omission of it from some ancient documents does not show that it was not then recognised. Those documents relate to the parish generally. The Appellant here only sets up his modus for those particular demesne lands, and the evidence he has produced amply supports the alleged payment.

Mr. *Boteler* and Mr. *Beames* for the Respondent:—  
 The omission of this alleged money payment from the Survey and other documents clearly shows that it must have had an origin subsequent to the time of legal memory, for it is impossible to believe that so large a sum should have been left altogether without mention in them, had its existence been known and its legality recognised. The Appellant's case rests altogether on presumption, but the presumption of law is in favour of the full legal claim to tithes, and an exemption from such payment, or commutation for it, must be strictly proved. It is not proved here.

Lord *Denman*, recently appointed Deputy Speaker, presided at the hearing of the appeal; his Lordship, after taking time to consider the case, referred to and adopted the reasons stated by the Lord Chief Baron in the Court below, and therefore moved to affirm the decree.

April 14.

The decree was accordingly affirmed.



## APPEAL

July 19,  
1834.  
10 March,  
1835.

FROM THE COURT OF EXCHEQUER IN EQUITY.

ARTHUR CHAMPERNOWNE and Others - *Appellants*.

ELIJAH BROOKE and Others - - - - *Respondents*.

*Practice.*  
*Vendor and*  
*Purchaser.*

Where a decree has been made against a party upon hearing, and he omits to present a petition for rehearing within the limited time, if he afterwards presents a petition complaining of some omissions in the decree, an order made on such petition supplying the omissions is irregular. The proper course would be to file a bill of review.

*Semble* that the purchaser of an estate, the value of which is increased by the wearing of lives, may be called upon to pay interest on the purchase-money in respect of that increased value from the time when he becomes by law entitled to receive the rents and profits.

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JAMES TOWNSEND, Elijah Brooke, Richard Smith and John Buller Pearse, were, in December 1810, seised in fee-simple, as tenants in common, of four equal parts of the borough, manor and lordship of Honiton, in Devon, with its royalties, &c., and all messuages therein; and being desirous of selling the same to pay a debt then due from Townsend, Brooke and Smith to Hammersley & Co., bankers, conveyed the estates on the 29th December 1810, to Richard Nowell in trust, for sale, and by another indenture of the same date made him trustee of the monies to arise from the sale. The estates were put up to sale, and bought in. One Charles Scott afterwards agreed to purchase them, but did not complete the purchase.

By articles of agreement, dated 11th December 1812, between Charles Scott of the first part, Sir Christopher Hawkins of the second, James Townsend of the third, Richard Smith, Elijah Brooke and James Townsend, therein described as bankers and copartners, of the fourth, John Buller Pearse of the fifth, Hugh Hammersley, Charles Greenwood, J. R. Drewe and Henry Brooksbank, of the sixth, Richard Nowell of the seventh, and Arthur Champernowne of the eighth part ; after reciting the indentures dated on the 29th December 1810, and certain agreements dated the 27th May 1811, the 21st October 1811, and the 18th April 1812, and reciting that Champernowne had agreed to become the purchaser of the borough, &c. for 70,000 *l.*, and further reciting that 10,000 *l.* had been paid on the 13th February 1812, by Scott for Champernowne ; it was agreed by and between all and every the said parties thereto, that the said several therein recited agreements should be from thenceforth null and void. And it was witnessed, that in consideration of the sum of 60,000 *l.*, thereafter agreed to be paid by Champernowne to Hammersley & Co., Nowell did for himself, his heirs, &c., by and with the consent and approbation of Smith, Brooke, Townsend and Pearse, and also of Hammersley & Co., testified as therein mentioned, promise and agree to and with Champernowne, his heirs and assigns, that Nowell, his heirs and assigns, should on or before the 1st day of May then next ensuing, at the proper costs and charges of Hammersley & Co., make out a good title unto, and at the charges and expenses of Champernowne, his heirs and assigns, by such conveyances, &c. as Champernowne, his heirs and assigns, or their counsel, should lawfully and reasonably advise or require, well and sufficiently convey and assure, by

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proper parties, to the use of Champernowne, his heirs and assigns, &c., all the borough, lordship and manor of Honiton, in the county of Devon, with its rights, royalties, &c., and all the messuages, &c. to the said borough, lordship and manor belonging, as set forth and described in the particulars annexed to the said agreement of the 27th day of May 1811 therein recited, free from all incumbrances, save and except certain leases granted of part of the said premises for terms of years, and the lives of certain persons, as set forth in the said particulars, and which were then unexpired, and not determined; To hold the same unto Champernowne, his heirs and assigns, &c., freed and discharged from all incumbrances whatsoever, save and except the land-tax, and except the leases for years and lives chargeable upon and affecting the said borough, manor, hereditaments and premises. And Smith, Brooke, Townsend and Pearse did thereby for themselves, their heirs, appointees and assigns, promise and agree to and with Champernowne, his heirs and assigns, that he, Champernowne, his heirs and assigns, should be entitled to the rents and profits of all and singular the said borough, manor, messuages, hereditaments and premises, from the 1st day of May then next, or from such time as the said purchase should be completed. And it was thereby further witnessed, that for the considerations aforesaid, &c., he, Arthur Champernowne, did promise and agree to and with Nowell, and Hammersley & Co., that he, Champernowne, should and would, on or before the 1st of May then next, pay to Hammersley and Co. the sum of 60,000*l.*, remainder of the said sum of 70,000 *l.* as and for the absolute purchase of the said borough, &c. And Champernowne did thereby for himself, his heirs and assigns, further promise and

agree to and with Hammersley, Greenwood, Drewe and Brooksbank, their executors, &c., and also with Smith, Brooke, Townsend and Pearse, their heirs and assigns, that he, Champernowne, his heirs and assigns, should pay unto Hammersley, Greenwood, Drewe and Brooksbank, or to Nowell, upon the trusts reposed in him and them by the indenture of trust of the 9th day of December 1810, all and every such sum and sums of money for the increased value of the said borough, manor, messuages, hereditaments and premises, or any part thereof, by or in consequence of the death or deaths of any person or persons since the 29th day of September 1811, for whose life or lives any of the said messuages, lands, tenements and hereditaments were theretofore granted. And lastly, it was thereby agreed between Smith, Brooke, Townsend and Pearse, and Champernowne, that such increased value should be ascertained by one indifferent person, if they should agree in the nomination of such person; if not, by two indifferent persons, one to be chosen by the said Smith, Brooke, Townsend and Pearse, and the other by Champernowne; and in case such two persons should not agree in their valuations of such increased value, then they should name an umpire, and that the award or decision of the person or persons so to be chosen or nominated as aforesaid, should be conclusive. Provided always, and it was thereby agreed between Smith, Brooke, Townsend, Pearse, Hammersley, Greenwood, Drewe and Brooksbank, and Champernowne, that Smith, Brooke, Townsend and Pearse should be allowed interest by the said Hammersley, Greenwood, Drewe and Brooksbank, upon the sum of 7,000*l.*, part of the sum of 10,000*l.*, at the rate of 5*l.* for 100*l.* by the year, from the 13th February then last to the time of the completion of the said

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purchase; and that Champernowne should in like manner receive from or be allowed interest by Hammersley, Greenwood, Drewe and Brooksbank, upon 3,000 *l.* residue of the said sum of 10,000 *l.*, at the same rate and for the same period; but in case a good title could not be made to the said borough, &c., then they, Hammersley, Greenwood, Drewe and Brooksbank, should and would pay, or cause to be paid unto the said Arthur Champernowne, his executors, administrators and assigns, the said sum of 10,000 *l.*, with lawful interest for the same from the said 13th day of January then last, until it should be ascertained and settled that a good title could not be made out to the said borough, manor, lands and tenements.

On the 15th of March 1813, Champernowne paid into the banking-house of Messrs. Hammersleys the sum of 15,000 *l.*, in further part payment of the purchase-money of the said borough, for which Messrs. Hammersleys agreed to allow interest at the rate of 5 *l.* per cent. upon the completion of the purchase. The said estates were subject to two mortgages: one for 11,000 *l.* to John Beague, Richard Bere and Henry Dunsford (executors of John Dickenson), and the other for 2,000 *l.*, to William Peard Tillard and Malachi Blake, for the term of one thousand years. On or about the 15th day of May 1816, the said Nowell received a draft conveyance of the estate from himself to or in trust for Champernowne, and prepared by Mr. Spedding, the solicitor to Champernowne, wherein it was recited (amongst other things) that the increased value arising from the deaths of lives had been fixed and ascertained at the sum of 1,454 *l.* 7 *s.*, and the decreased value, owing to the inaccurate statement of the ages in a particular of sale therein referred to, had been estimated at the sum of 961 *l.* 8 *s.* 11 *d.*,

leaving as an increased value upon the whole, the sum of 492*l.* 18*s.* 1*d.*, and the said sum of 492*l.* 18*s.* 1*d.* made, together with and in addition to the said sums of 10,000*l.* and 15,000*l.* already paid, and the sum of 45,000*l.* which remained to be paid, the full sum of 70,492*l.* 18*s.* 1*d.* And the draft conveyance also recited, that the mortgage sums of 11,000*l.* and 2,000*l.* were to be retained by the said Arthur Champernowne out of that part of the said purchase-money which so remained to be paid as aforesaid; and that after such deductions, there remained to be paid by the said Arthur Champernowne, for the remainder of the said purchase-money of the said hereditaments, the sum of 32,492*l.* 18*s.* 1*d.*

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Nowell returned the said draft conveyance to Spedding, approved of, on the 4th July 1816, but the same was never, in fact, executed by any of the proposed parties thereto.

In Michaelmas term 1817, Townsend, Brooke, Pearse, and Messrs. Hammersley, filed their bill in the Exchequer against Champernowne, stating the facts to the effect hereinbefore stated; and praying for specific performance, by Champernowne, of the agreement of the 11th December 1812.

Arthur Champernowne filed his answer on the 17th April 1818. Several of the parties died, and bills of revivor were filed against their representatives.

The cause came on to be heard in the Court of Exchequer on 24th February 1821, when the Court decreed that it should be referred to one of the Masters to inquire and report, whether the complainants in the said suit could make a good title to the estates and premises comprised in the said contract of the 11th of December 1812; and if the Master should find that the plaintiffs could make a good title, then he was

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to inquire and state at what time they were able to make such title, and at what time they at first showed to Arthur Champernowne, deceased, or to his solicitor, that they were able to make such title; and whether the value of the said estate and premises had been diminished by any dilapidations which had taken place since the 11th day of December 1812, and to what amount, &c.; and that the Master should also inquire and report whether any arrangement binding upon the representatives of Arthur Champernowne, deceased, was come to in his lifetime, with respect to the deductions to be made from the purchase-money on account of the ages of some of the persons for whose lives part of the estates and premises comprised in the contract had been let, having been inaccurately represented; and if the Master should find that any such binding arrangement took place, then he was to state the particulars thereof; and if he should find that no such binding arrangement did take place, then that he should also inquire and state what deduction ought to be made from the purchase-money on account of such inaccuracy in the description of the ages of any of the persons for whose lives any part of such estate and premises was let; and that the Master should also inquire and report whether any of the persons for whose lives any part of the estates and premises comprised in the said contract was held on the 29th day of September 1811, had died since that time, and whether any arrangement binding upon the representatives of Arthur Champernowne, deceased, was come to in his lifetime, with respect to the payments to be made by Arthur Champernowne, deceased, on account of the lives which had so dropped, or any of them: And it was further ordered by the Court, that the said Master should also inquire and report how much the value of the said estate and

premises had been increased by the deaths of such persons, or of such of them as to which no such binding arrangement should be found to have been made; and the Master was thereby at liberty to make such separate report or reports to the said Court from time to time as he should see fit; and further directions were reserved.

The Master proceeded, in pursuance of the decree, to inquire into the title of the plaintiffs, and made a report on the 16th August 1824 against the title; exceptions were taken by the plaintiffs to such report, and were allowed, and the Master was directed to review his report generally touching the matters and things referred to him by the decree.

The Master, therefore, proceeded on the inquiry, and finally reported, on 29th March 1827, in favour of the title, with the exception of a very small portion of the estate and premises; and that the plaintiffs were first able to make the same on the 20th January 1825.

The defendants took exceptions to this report, but they were overruled.

The plaintiffs also excepted to the report, insisting that "The Master ought to have found that the plaintiffs were able to make such good title previously to the commencement of the suit." By an order dated 11th July 1827 this exception was allowed, but others taken at the same time were disallowed.

The Master then proceeded on the inquiry directed by the decree, as to the increased value of the estate by the deaths of lives; and by his report dated 7th April 1831, after stating the grounds on which his calculation had proceeded, he declared that he found the total increase of the value at that present time to amount to the sum of 2,168*l.* 5*s.* 2*d.* And that as

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each party had threatened exceptions to his report, on the ground of the basis on which the values were calculated, he had made a separate report as to certain premises therein named, and subjoined a statement of the mode of calculating the same; so that if the Court should think that he had proceeded on an erroneous basis, no unnecessary expense might be incurred.

Exceptions were taken by the defendants to this report on the 15th April 1831, and came on to be argued before Lord Lyndhurst (Chief Baron), on the 5th day of May 1831, when his Lordship expressed an opinion favourable to the report, but thought a difficulty arose in the way of granting the plaintiffs the relief thereby granted to them, from the wording of the decree of the 24th of February 1821, and ordered the exceptions to stand over, with liberty for the plaintiffs to present a petition for re-hearing, or such other petition as they might be advised.

The plaintiffs accordingly, in the early part of June 1831, presented a petition of re-hearing, which not having been, according to the forms of the Court, presented within six months after the decree had been pronounced, could not be granted.

The plaintiffs thereupon, on or about the 7th July 1831, presented a petition, complaining of certain omissions in the decree of the 24th February 1821, as to the manner in which the Master was to calculate the wearing and dropping of lives, and praying that the Court would be pleased to order, by way of supplement or addition to that decree, that the Master should be directed to inquire and report to the Court how much the value of the estate and premises had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part of

the said estate or premises were held on the 29th day of September 1811 ; and that the report of the Master might, as to the several values by the deaths of lives and by the wearing or increased ages of lives, be brought down to the date of the Master's report, so that the cause might, on the confirmation of such report, be in a state for a final decree and decision between the parties.

This petition came on for hearing on the 9th July 1831, when the Court ordered and decreed, That the Master to whom the cause stood referred, should, in addition to the several directions contained in the decree made on the hearing of the said cause, bearing date the 24th day of February 1821, inquire and report to the Court how much the value of the estate and premises in the pleadings of this cause mentioned had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part or parts of the said estate and premises was or were held on the 29th day of September 1811 ; and in making such inquiry the said Master was to make to all parties all just allowances, and all parties were to produce before and leave with him upon oath all deeds, books, papers and writings in their or either of their custody or power relating thereto, and were to be fully examined upon interrogatories touching the same, and otherwise touching this inquiry as the said Master should direct.

And that the said Master should proceed to make the inquiry he was directed to make by the said decree of the 24th of February 1821, as to how much the value of the said estate and premises had been increased by the deaths of any of the persons by whose lives any part or parts of the said estate and premises were held on the said 29th day of September 1811,

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and bring down the same, as also the inquiry he was thereby directed to make as to how much the value of the said estate and premises had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part or parts thereof were held on the said 29th day of September 1811, to the date of his report to be made in pursuance of the said order. This was the order appealed against.

Sir *W. Follett* (Solicitor-general), for the Appellants:—The first objection to this order is, that by the practice of the Court the order ought not to have been made. But assuming for the moment that that objection does not exist, then the decision below is wrong, according to all the rules of equity. As to the first objection, the parties here are out of time. In *Brackenbury v. Brackenbury* (a) it was distinctly held, that after a decree, the Court would not, on motion, make an order to vary that decree. The Lord Chancellor there said, “Where the decree has directed an ejectment, without restraining the party from setting up the outstanding term, that cannot be set right except by appeal or re-hearing. The only question is, whether the addition to the decree thus made upon motion, be regular or not?” His Lordship afterwards added: “If the defendant chooses to file a bill to put the term out of the way, the Court, if a proper case were made out, might be able to relieve him; but it cannot be done upon motion. I cannot, upon motion, do anything with the original decree; and the order which was made on the motion before the Vice-Chancellor must be discharged.” The bill here prayed a certain relief, and a decree was

(a) 2 Jac. & W. 391.

made upon hearing. This order directs a further and additional inquiry; one which had not been sought by the bill, nor directed by the decree. In *Creuze v. Lowth* (b) application was made for an order for interest after a decree had been made. The Lords Commissioners had at first allowed the order on petition (c); but when the case came before the Lord Chancellor Loughborough, he had it argued upon that point, and said, "No such order could be made on petition; for if interest was not given by the decree, or reserved, it was matter of re-hearing; and this, in strictness, is the rule: but if the point is made upon a hearing for further directions, I see no objection to its being then given, if the case will warrant it." The present is a petition to vary the original decree, and the plaintiffs cannot get such an order on petition; they must adopt another mode of proceeding. Then as to the second objection, the parties have no right to any advantage which they have not stipulated for; nor can the Court itself add to a contract a term which is not to be found in the contract itself.—[Lord *Lyndhurst*, C.: Suppose that there is a sale of a reversion of a term, with a nominal rent; that 19 years of the term have run out while one of the parties has refused to perform the contract, and at the end of that time the Court decrees specific performance of a contract made 19 years before, the party would have three or four times the value of his money, on account of his own litigation. Surely a decree for specific performance must be to perform the contract as he ought to have performed it years before.]—The distinction between the case supposed and the present case is, that here the parties against

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(b) 4 Bro. C. C. 316.

(c) *Ib.* 157.

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whom the application in the petition is made, have always endeavoured to enforce the agreement. There is no ground of complaint against them on the score of delay. In *Davy v. Barber* (*d*), and in *Blount v. Blount* (*e*), a distinction between biddings in the Master's office and a private sale was referred to; but there has been no case distinctly deciding, that upon the ground of that distinction a purchaser shall or shall not pay interest. In the latter case the principle laid down was, that he shall not pay interest till he is let into possession. The order here proposes that the Master shall inquire into the difference of value of the property now and in September 1811, when the first statement was made that the title was completed: but it is clear that even in 1817, when the Respondents filed their bill, they were not in a situation to compel the defendants to accept the conveyance; for even at that time they were not able to make a good title to the premises. It is clear that they were not in a situation to make a good title till January 1825; so that if the Appellants are to pay interest, they cannot be called upon to pay earlier than that time, and in that respect the order upon the petition is defective in itself. The Appellants cannot be called on to pay interest where the other party was in fault.—[Lord *Brougham*: This is not a question as to the fault of either party. The thing contracted for has, in fact, increased in value; the purchaser will get an advantage by that increase, and ought to pay for it.]—[Lord *Lyndhurst*, C.: He will come into possession of a more valuable property.] The Court cannot make him pay an increased value for it, except the non-performance of

(*d*) 2 Atkins, 489.

(*e*) 3 Atk. 636.

the contract has been his fault. [Lord *Lyndhurst*, C.: The argument for the Appellants loses sight of the fact, that they have had the purchase-money in their pockets all this time, and have been making interest of it.— Lord *Brougham*: The parties must be put in the same situation as at the time of making the contract, and the interest of the money retained in the pocket of one must be set against the profits derived from the estate in the meantime by the other. But here the case is still stronger: it is as if I put the rent, as I receive it, into a bag, and send it to the banker's, and at the end of some years you come and say, "Give me the estate, and the bag too, though I have been keeping the purchase-money of the estate in my possession all the time, and have been getting interest upon it."—But here the Appellants do not now want the estate, whereas the other parties insist that they shall have it. The case of *Jones v. Mudd* (*f*) limits the liability of the Appellants. In that case it was stated, that a purchaser who has not been in possession is bound to pay interest on the purchase-money only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase. That case must govern the present. The true doctrine of the Court on this subject has been laid down in the case of *Esdaile v. Stephenson* (*g*), where the Master of the Rolls said: "Where there is no stipulation as to interest, the general rule of this Court is that the purchaser, when he completes his contract, after the time mentioned in the particulars of the sale, shall be considered as in possession from that time, and shall from thence pay interest at 4*l.* per cent., taking the rents and profits. If, however,

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(*f*) 4 Russ. 118.

(*g*) 1 Sim. & Stu. 122.

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such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then to give effect to the general rule would be to enable the vendor to profit by his own wrong, and the Court, therefore, gives the vendor no interest, but leaves him in possession of the interim rents." If that rule is applied to the present case, the order of the 9th July cannot be supported.—[Lord *Brougham*: In *Blount v. Blount* the Court considered the dropping in of lives, and said, that if that happened between the time of a person being reported the best bidder by the Master and his taking possession, it would order a compensation on that account, or direct that otherwise the parties should go again before the Master, and a new bidding take place.]—There the party was left to his option; not held bound to the contract, the nature of which had been changed by the lapse of time. The Appellants here would be glad in like manner to be left to their option.

Mr. *Pemberton*, for the Respondents :—It is a novel doctrine, that the Court will make a difference in its decision respecting a contract on account of the persons who seek to enforce it. It is perfectly obvious that what the Appellants insist on is, that the purchaser may take both the interest and the profits.—[Lord *Lyndhurst*, C.: The case of *Jones v. Mudd* proceeds on the principle of striking a balance.]—This is an ordinary case of sale and purchase: it will be impossible to reverse this order, without making another of the same kind on further directions. It is supposed that the vendor has only a right to interest when the delay is attributable to the purchaser. What then is the consequence? There must be an

account of the rents and profits actually received. But suppose that the delay is attributable to the vendor; then it is said that the purchaser is not to pay interest till the purchase has been completed, and the purchaser put into possession; then the vendor ought to remain in possession of the rents and profits till the conveyance is made. The argument here puts the vendor in this situation, that he has not any advantage at all from the dropping of lives. No such rule can be found laid down in any of the cases. The year 1811 is objected to as a wrong time from which the calculation is to be made, as that was not the time when the purchase could be completed. But the purchaser was then to be considered in possession; he was in the receipt of the rents and profits, when by force of this contract he prevented us from following up the lives, and so receiving the fines. An inquiry of the kind directed by this order is absolutely necessary, as this is property partly in possession and partly in reversion. The original contract with Scott was entered into in the year 1811, and the Appellant took upon himself the same contract and the same obligations as Scott. The Court would have been working injustice in refusing this order. The Court has found, that from the 29th September 1811 the vendee was to be considered in possession of the property, and was consequently to be held entitled to the rights and subject to the liabilities of such a situation. But the case is still stronger against the purchaser: he cannot protect himself against the liabilities arising from his situation as purchaser by saying that he was not at once let into actual possession. The covenant says, that before the 6th day of May the sum of 70,000*l.* shall be paid. The engagement to pay is positive and express; the provision

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that the purchaser shall be let into possession is not positive, it is qualified: that shows that the payment of interest on the purchase-money is not subject to the same uncertainty as the letting into possession. Either it must be said that the vendor remained in possession till the purchase was completed, and so had all the advantage of receiving the increasing rents, or that the purchase must be completed on a particular day, with all the consequences of a neglect in so doing. As to the objection to this order as matter of practice, it is admitted that it is a settled rule of Court not to vary a decree on motion: but this is a perfectly different case; for this was on petition, and in an order on petition the facts of the decree and of the previous proceedings are recited, and brought to the knowledge of the Court. A variation of a decree is not permitted on motion, unless all the parties are before the Court; but if they are all, as they were in this instance, before the Court, there is no objection to the order. There was an irregularity in the original decree; for it directed not only a reference as to the title, but certain inquiries, which depended on the materiality of the Master's report as to that title. In *Creuze v. Lowth* the application was unnecessary, and was therefore rejected. There a further account had been directed, and as the case would necessarily have to come again before the Court on further directions, the application was deemed unnecessary, and therefore irregular. The original decree here was to a certain extent premature. At all events that which has been done in this case was necessary to correct the original decree; and if not done on petition, can be done when the case comes on again on further directions. The House will not, for the sake of a mere empty form, reverse an order which has done

substantial justice between the parties. A bill was filed for an account; an account was directed to be taken before the Master, who reported that the rents and profits more than kept down the interest of a mortgage; and he reported other facts which might have been known when the decree was made. This order is for the Court to obtain information which it is absolutely necessary that it should possess, that it may do justice between the parties. All the cases concur in the view of the subject now taken, and none of them justify the assertion that the purchaser shall not pay interest and yet shall receive the increased value of the estate.—[Lord *Brougham*: *Blount v. Blount* says, that nothing shall be paid for the wearing of lives.]—But that was a case where there was no stipulation as to interest. Still if the purchaser gets an advantage he must pay for it; he will not pay more, but less than he gets. If it should appear that the amount of interest exceeded the increased value, he would only have to pay the balance, or so much as was equivalent to the increased value.—[Lord *Brougham*: Do you not admit that this is an alteration of the decree? Exceptions were stated to the Court: you did not have them argued, but came to the Court and asked for an alteration in the directions given to the Master. You called on the Court to retrace its steps. It is a dangerous thing to open a door to alterations of decrees on motion or on petition, or even on further directions. This is almost the only ground of doubt we have. This is an addition to the decree, not a variation of it. The order supplies something that was omitted, but does not alter what already existed.—[Lord *Lyndhurst*, C.: My difficulty is, that this was not done on further directions, but on a special report of the Master. Was it absolutely

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necessary that this should be done, when the Master had suggested that it would be convenient to take the opinion of the Court on a particular point, with a view to save expense.]—There is another view of the case, which removes the difficulty. Anything which has arisen since the date of the decree might properly be made, upon order, the subject of an additional inquiry. It is said that the Appellants were not in default till 1825; but it was admitted that they were so then, for it was conceded that the calculation of interest, if allowed at all, might commence from that period. Now, that point was raised after the date of the decree, and the inquiry resulting from it, might be directed, on motion, as an addition to the decree.

Sir *W. Follett*, (Sol. Gen.), in reply. We are ready to abandon the contract, and give the Respondents the benefit of the increased value of the property. It is said, that upon further directions an order of this kind might be made. Assuming that, which implies that it could not be made otherwise than on further directions, then this order was wrong, for it was not made on further directions. This was not a special separate report of the Master, which might be made the subject of an order, after a decree had been passed; it was only an explanation of the mode he had adopted in calculating the value of the property, and was appended to the report solely with the view of saving further expense. There was no reason in this case for departing from the ordinary practice. There is no distinction between a petition and a motion with respect to the altering of a decree. The Court cannot alter a decree but on a re-hearing or a bill of review. The burden of showing that a Court of

Equity might make such an alteration lay on the other side, and no authority for it has been produced. As to the order itself there are two objections to it; first, that it ought not to allow the wearing of lives to be taken into consideration at all; and next, that if at all, it ought not to allow the wearing of the lives to be taken into consideration prior to January 1825, for till then it is not pretended that the Respondents were in a situation to make a title to the estate.

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Lord *Brougham*:—My difficulty in this case has chiefly arisen from *Blount v. Blount* (*h*), and if we take the judgment of Lord Hardwicke in that case liberally, then undoubtedly that case is an authority against the principle on which the present has proceeded, of allowing interest on the wearing of lives. Lord Hardwicke is there reported to have said, “as to what has been said of the advantage a purchaser receives from wearing out of lives, I never knew the Court take this into their consideration as a reason for a purchaser’s paying interest.” There is no distinction, as there supposed, at least so far as I am aware of, founded upon the circumstance of the bill being for specific performance of a private contract or for the specific performance of the conditions of open biddings at the Master’s office. But I have another and a more general objection to the authority of *Blount v. Blount*; and I feel a strong inclination in favour of the decision of Lord Lyndhurst upon that point. We must consider the difference between the times of Lord Hardwicke and the present day. In Lord Hardwicke’s days cases of this sort,

(*h*) 3 Atk. 636.

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giving rise to questions of nicety and difficulty as to the calculation of the value of property at different periods, were of less frequent occurrence, and consequently were subjects of less familiar illustration, and were less understood than now, when the variations in the funds, the greater amount of pecuniary transactions, the extended commerce of the country, and the new and varied modes of investing capital, bring into daily calculation things of which the very wisest calculators then knew nothing. There is something so pressing and strong against the equity of the case in allowing a purchaser a profit on the purchase-money and the advantage of receiving the rent, both at the same time, (from whatever cause he may have been kept out of possession of the estate), and in refusing the person who sells the estate either interest on the purchase-money or the profits of the land, (for if the purchaser in the end gets possession he will, in the contemplation of the law, have been in possession all the time, and will be entitled to the rents which have accumulated, so far as the disposal of those rents has not been covenanted for), that I confess I do entertain a strong feeling on the subject. I have, in fact, no doubt upon the merits of this case. At the same time I admit that the course adopted in this case lays down a dangerous precedent, for such, the attempt to get the Court to alter a decree without a bill of review, must be considered. I am, therefore, of opinion, and my noble and learned friend is of the same opinion, that it would be a dangerous thing to open a door to attempts of this sort, feeling convinced as we do, that matters would often be tried to be carried further than the precedents we should make would strictly justify. I have no doubt that the attention of the Court below, when the case was argued

there, was not called properly and effectively to this point. There was another and more important point, namely, the merits of the case, to which attention was there chiefly directed. I do not wish to be called upon to give any express or distinct opinion on this point. I have thrown out my view of the matter, and if that intimation of opinion is acted upon, it may save both parties a great deal of time and expense. On the other point, the point relating to the altering of the decree upon petition, I think that the order cannot stand. The order of the 9th of July must therefore be reversed. But I think that this case having been fully considered, the parties will see the propriety of settling the matter, with a view to what, after this intimation of opinion, will probably be the ultimate effect of our judgment.

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Lord *Lyndhurst*, (Lord Chancellor) :—I fully concur with the observations, as to the case itself, just made by my noble and learned friend. As to the point on which the decision of this House will proceed, I shall only say, that this was a new experiment to get a rehearing, the parties being out of time to get one in the ordinary way. I have no recollection of what passed, if anything did pass, as to the regularity of this mode of proceeding; probably the whole that was said upon it was an observation of one of the counsel suggesting that if the order was made on a petition of this sort it would be irregular: the point certainly was not argued.

Order of the 9th July 1831 Reversed.

## APPEAL

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FROM THE COURT OF CHANCERY IN IRELAND.

March 10-15. Sir JAMES CALEB ANDERSON, Baronet,  
 PETER PURCELL and WILLIAM STOCK- } *Appellants.*  
 LEY, Esquires - - - - - }  
 WILLIAM WALLACE - - - - - *Respondent.*

*Award.* IT is no objection to an award that the arbitrators have in the absence of one of the parties called in the other, and have asked him whether he admitted or disputed certain items in an account, and have merely taken his answer to that question.

Under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and property of a partnership, it is no objection to their award that they have availed themselves of the assistance of such person in deciding on the partnership accounts. The arbitrators by adopting in terms the opinions of such person, do not constitute him an umpire, but make his opinions their own, and their award cannot be impeached on that account.

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IN October 1820, John William Anderson, since deceased, the Appellants Peter Purcell and William Stockley, and Cromwell Wallace, then of the city of Dublin, esq., and since deceased, and the Respondent, engaged in a copartnership for the purpose of carrying on the business of a public coach company; and accordingly, by certain articles of agreement entered into, and bearing date on the 5th day of that month, between the said John William Anderson of the first part, the Appellants Peter Purcell and William Stockley of the second part, the said Cromwell Wallace of the third part, and the Respondent William Wallace of the fourth part, it was agreed between the said several parties that they should enter into a co-

partnership, to be called the Southern Coach Company, to commence from that day, and to continue until the 5th day of February 1833, for the purpose of carrying on the business of a coach company, and of running mail-coaches and stage-coaches from the city of Dublin to the cities of Cork and Waterford, and to such other places as might be thereafter agreed upon for the conveyance of His Majesty's mails, and carrying passengers and luggage, as in said articles of copartnership was particularly set forth ; and it was thereby agreed that the Appellants Purcell and Stockley should be entitled to one third part or share of the profits of the said concern, the said John William Anderson to one other third, the said Cromwell Wallace to one sixth, and the said Respondent William Wallace to the remaining sixth.

John William Anderson afterwards assigned his share therein to the Appellant Sir James Caleb Anderson, bart., who thenceforth became and acted as a copartner therein.

Disputes afterwards occurred among these parties, the Appellants, together with Cromwell Wallace, charged the Respondent with misconduct in his share of the concern ; and in the month of February 1826 they filed their bill in the Court of Chancery in Ireland against him, and therein prayed that the said copartnership might be dissolved, and that an account might be taken of all the partnership dealings and transactions between the Plaintiffs and William Wallace in the said suit, which were open and depending between them ; and that such sum as should appear to be due by the said William Wallace on account of the said dealings and transactions might be decreed to be paid by him ; and that in the meantime he might be restrained by injunction from interfering in any part

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of the management of the business of the concern, &c., and that a proper person should be appointed to carry on and manage the partnership business, and to receive all debts due to the partnership, and all the accruing profits thereof, and that five sixth parts of the monies arising, after payment of the necessary expenses and charges, should be paid to the Plaintiffs in the cause, in the proportion of their several shares in the partnership; and that the remaining sixth part should be paid into court, to the credit of the said cause, as a security for the sum which, upon the said account, should appear to be due to the said Plaintiffs in the said cause by the Respondent William Wallace.

An application was afterwards made, on motion, for an injunction to prevent the Respondent from interfering in the business.

The Respondent filed his answer on the 11th April 1826, denied all the allegations in the bill as to his supposed misconduct, and claimed a large sum of money as due to him from the firm.

On the 12th of May 1826 the Plaintiffs filed an amended bill in the said cause, to which the Respondent, on the 4th of November 1826, filed his answer; and issue having been afterwards joined, and witnesses examined on both sides, the cause came on to be heard before the then Lord Chancellor of Ireland, on Monday the 30th day of July 1827, when after some discussion had taken place it was agreed between the Petitioners and Respondent William Wallace to settle their differences by arbitration, upon certain terms then agreed upon, and accordingly a decree was made by the Court, whereby it was ordered, by consent of all parties, that the partnership between the Plaintiffs and the Respondent should be dissolved, as to the

share of the Respondent, upon the terms following, viz. the Plaintiffs undertaking to purchase all the Respondent's stock of horses, harness and forage, stables, office fixtures and stable articles or implements, and to pay the Respondent for the same within such time after the valuation thereof should take place, and without waiting for the final result of the reference, as the arbitrators thereafter appointed should think fit; the Plaintiffs also undertaking to purchase the Respondent's share in the copartnership concern, and to pay to him, within such time as before mentioned, the value of the said share; the same to be estimated with due regard to the agreement on the part of the Respondent not to run coaches upon certain roads, as thereafter stated. Then followed mutual undertakings, rendered necessary by these arrangements. And it was further ordered, that it should be referred to the arbitration of William Dillon and Andrew Vance, with power to call in a third person in case of difference, to determine the value of the Respondent William Wallace's stock and property, as thereinbefore mentioned; and that the said arbitrators should be at liberty, if they should see fit, to have recourse to competent persons to assist them in the said valuation: and it was further ordered that the said valuation should take place within a month from the date of the said decree. And by the said decree all the partnership accounts, and all other matters in difference in the said cause between the parties Plaintiffs and the Respondent, including the claims of the Respondent relative to the expenses and losses sustained in consequence of the injunction theretofore issued against him, and also the claims of the Plaintiffs respecting any losses or expenses

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sustained on their part in relation to the same matters, were referred to the said arbitrators: and it was further ordered that the said arbitrators should have power, from time to time as they should think fit and just, to make orders in the nature of interlocutory orders, respecting any of the matters so to them referred, without waiting for their final decision on the whole of the matters referred to them, and that such orders should be obeyed and have the same efficacy as if comprised or contained in a final or complete award: and it was further ordered, that in case the said William Dillon and Andrew Vance should not agree, they should be and were thereby empowered to call in a third person to determine between them, whose award or umpirage should be binding and conclusive on the parties Plaintiffs and the Respondent, and should be made the order, judgment or decree of His Majesty's High Court of Chancery in Ireland; and the better to enable the said arbitrators to proceed on the said accounts so to them referred, they were to be armed with a commission to examine all such witnesses as should be produced before them by the parties Plaintiffs or the Respondent, touching the matters of the said accounts: and it was further ordered, that all parties should be and they were thereby declared at liberty to examine each other on oath before the said arbitrators: and it was further ordered that all parties should produce, on oath, all deeds, papers, evidences and books of account in their hands, power or custody, relating to the said accounts, as the said arbitrators should think fit.

The valuation directed by the reference was completed on the 11th of August 1828, and on the 26th day of that month the arbitrators met, and by an inter-

locutory order declared the particulars and amount of such their valuation, which was subsequently paid by the Plaintiffs to the Respondent.

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In June 1830, Cromwell Wallace died; the Respondent (his brother) took out letters of administration to his estate and effects, and thereupon the bill was revived against the Respondent in his representative character.

No further meeting of the said arbitrators was held until 1832, and on the 3d of July in that year a meeting was held, and both parties attended with their counsel and solicitor, and one Samuel Parkinson, the book-keeper of the Appellants, and the several matters referred to the arbitrators were fully discussed, and the Appellants and the Respondent respectively closed the cases.

On the 4th of July both parties were apprized that the arbitrators did not require the further assistance of counsel or solicitors for either of them.

The arbitrators held some further meetings after the 3d of July, and before the date of their award, and made their award on the 21st of July 1832, whereby, after formally awarding payment of the money to the Respondent for his stock of horses, &c. (already awarded and paid under their interlocutory order of the 26th of August 1828), they further awarded that a sum of 5,400*l.* should be paid to the Respondent for his share in the Company, from the day when the stock was delivered up to the day of the expiration of the partnership, and a sum of 4,643 *l.* 15*s.* 2½*d.*, as the balance of the accounts due to him; which two sums they ordered to be paid forthwith, and they directed the execution of certain bonds and releases, to secure the interests of all parties concerned.

The award was afterwards filed in the proper office,

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and by an order made in the cause on the 6th of September 1832, it was ordered that it should stand confirmed, unless by the last day of the then next Michaelmas Term good cause should be shown to the contrary. On the 26th November 1832 notice of motion to set it aside was given. Affidavits were filed on both sides.

The Appellants, in their affidavits, alleged that of the meetings which took place between the 3d of July, and the date of the award, neither they nor their solicitors had any notice; that the Respondents had notice of them, and attended at the same, and made statements thereat, which were received by the arbitrators, and materially influenced their judgments; and which statements the Appellants could and would have disproved, if the opportunity had been afforded them. On the other hand, the Respondent stated that at two only of these had he attended, and then at the desire of the arbitrators, and that their object in requiring his attendance was merely to know whether he admitted certain items in the Appellant's accounts, without requiring the same to be vouched or otherwise established; that he did admit these items, and that no further questions were asked of him. It was farther alleged by the Appellants in their affidavits, that the arbitrators had called in the assistance and acted upon the opinion of a Mr. James Hartley, who had, in fact, been thus made by the arbitrators an umpire between them. The Master of the Rolls gave liberty to the arbitrators to make an affidavit on the subject, and they accordingly, on the 19th of January 1833, filed an affidavit in relation to the said award. In that affidavit they alleged, amongst other things, that Samuel Parkinson, the book-keeper of Purcell and Stockley, attended at all the meetings subsequent to

the 3d of July 1832, either in the same room or in an adjoining room, with the books and accounts belonging to the Southern Coach Company; and that he so attended by the desire and direction of deponents, in order that they might from time to time refer to the books, and take extracts therefrom, and ask questions of him, Samuel Parkinson, respecting certain of the items charged in the said accounts; and say, that William Wallace, attended some, but not all, of said meetings, either in the same room or in an adjoining room, and that he so attended at the desire of these deponents; and that their object in having him in attendance during the time deponents were investigating the particulars of the accounts, was to ask him whether he would admit the several items charged in the accounts furnished on the part of Purcell and Stockley, or would insist on these deponents having the same regularly proved; and also on one other occasion deponents wished to know from him whether he would require an indemnity to be given to him mentioned in the said submission to arbitration; and on these occasions William Wallace was merely called into the room by deponents for the said purposes, and stated he would admit several of said items, and would not require any indemnity; and that said William Wallace did not upon any of those occasions make any other statement to the knowledge or belief of deponents, and they positively say that if he did, which deponents do not recollect, they were not influenced thereby, as deponents had then determined the principle on which the said accounts should be taken, and were employed solely in making out the details thereof. And that several of the items which William Wallace refused to admit, and especially several charges for fines and other expenses against him personally, and

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amounting, as deponents now best recollect, to 560 *l.* or thereabouts, were allowed by these deponents against the said William Wallace.

The arbitrators further stated, with respect to a mileage allowance that was found fault with by the Appellants, that the “sum or allowance of 2*s.* 6*d.* per mile was, in the judgment and opinion of deponents, and in the opinion and judgment of James Hartley, whom these deponents consulted upon the occasion, as hereinafter mentioned, full compensation for the work so performed.” They then went on to say, that after the 3d of July they held four other meetings; namely, on the 4th, 19th, 20th, and 21st of July aforesaid, and that at the meeting on the 4th of July, as deponents now best recollect and believe, they agreed to call upon Mr. James Hartley, who is extensively concerned in the management of public coaches, in order to have the benefit of his opinion and skill in making the necessary valuations, to enable deponents to settle and adjust the respective rights of the parties, and which these deponents considered themselves authorized in doing under the powers given to them by said order of submission; and they were induced to call in Mr. Hartley in consequence of one of them not being acquainted with the details of such matters, so as to enable him to form an accurate opinion with respect to the value of or proper charges to be made for several of the matters so referred to deponents; but that they did not call Hartley in as umpire, nor did the said James Hartley act as umpire, nor take any part in the making of said award, which is the award of these deponents alone. And that the Defendant, William Wallace, did not to their knowledge, recollection, or belief, at any of the said meetings at which the said James Hartley attended, make any statement

or do any thing more than answer such questions as deponents found it necessary to put to him from time to time respecting the items in the said accounts as hereinbefore mentioned, and respecting the said indemnity; and they say, that said James Hartley was with deponents only at the last three meetings, namely, on the 19th, 20th, and 21st of July aforesaid; and that the amount of the allowance made to William Wallace in the accounts for the value of his share for the period of four and a half years therein mentioned was diminished by a sum of more than 1,200 *l.*, in consequence of the valuation so made by James Hartley.

The motion came on to be argued on the 29th of January 1833, when the Master of the Rolls ordered that the cause shown by the Appellants, Peter Purcell and William Stockley, against the said conditional order of the 6th of September 1832, be allowed, and that the parties respectively should abide their own costs. The Respondent appealed against this order to the Lord Chancellor of Ireland, and the Lord Chancellor was pleased to order that the said Rolls' order of the 29th day of January 1833 be set aside, and that the said award do stand confirmed.

By a further order, bearing date the 13th of June 1833, it was ordered that the cause should be set down in the Lord Chancellor's list of causes, to be heard upon said award during the then sittings, and it came on to be heard on the 25th of June 1833, when it was ordered and decreed by the Lord Chancellor that the Respondent, William Wallace, was entitled to the two several sums of 5,400 *l.* and 4,643 *l.* 15 *s.* 2½ *d.* in the award mentioned, amounting in the whole to the sum of 10,042 *l.* 15 *s.* 2½ *d.*; and it was further ordered that the Appellants should within one calendar

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month pay to the Respondent the said sum so awarded as aforesaid.

The Appellants appealed against both these decrees of the Lord Chancellor; and in the mean time the sum in dispute was ordered to be paid into Court and invested in the name of the Accountant-General to the credit of the cause.

Mr. *Knight* and Mr. *Kindersley* for the Appellants:—One point of complaint against the award is, that after giving notice to the parties that further evidence would not be examined, the arbitrators held a meeting *ex parte*; that William Wallace attended that meeting and made statements to the arbitrators, and that no persons were summoned to attend them on the part of the Plaintiffs. This is clearly a ground for setting aside the award, and the Master of the Rolls was right in so considering it. Such a course of proceeding was, in *Walker v. Frobisher* (a), held sufficient for that purpose. It is of no use for the arbitrators to say that the statements of William Wallace did not affect their judgments. The arbitrator in *Walker v. Frobisher* said the same thing; but the Lord Chancellor observed, that an arbitrator must not take upon himself to say whether evidence, improperly admitted, had or had not an effect upon his mind. The parties impeaching the award are not bound to show that what the arbitrators did was morally wrong, or that there was fraud in it; irregularity alone is sufficient to set aside the award as where the arbitrators proceed irregularly, in having a meeting and hearing evidence *ex parte*. The circumstances in *Walker v. Frobisher* were not so strong as they are in the present case; for here the party himself, and not merely a witness, was the person examined by the

(a) 6 Ves. 70.

arbitrators; yet there the award was set aside: and on a subsequent occasion Lord Eldon referred (*b*) to what he had done in that case, as the proper course for a Judge to pursue. The arbitrators had no right to receive the evidence of William Wallace *ex parte*; they could only do so where, after full and fair notice to attend given to the other side, that notice had been disregarded. No such notice had been given here; on the contrary, the arbitrators had said that they would not receive more evidence. Then as to the accounts: they are improperly taken on the face of the award. Cromwell Wallace had been one of the Plaintiffs; he died; his brother William Wallace, the Defendant and Respondent, became his administrator, and yet the arbitrators have thought fit to award the payment of a sum of money by the plaintiffs in the suit, including of course Cromwell Wallace, to the Respondent; so that the Appellants are not only deprived of the advantage of the joint liability of Cromwell Wallace, but they are called on to pay over to him, or rather to the Respondent who represents him, a sum of money, to the payment of which his estate ought to contribute.—[Lord *Plunkett*: As the bill was framed, it was impossible to take the accounts as between the surviving Plaintiffs and the representatives of the deceased Plaintiff.—Lord *Brougham*: If I have an account against four parties, and three of them pay me, they may recover contribution from the remaining one.]—The arbitrators exceeded their power in calling in the valuers, for they have not exercised their own judgment on the valuers' estimates, but have taken those estimates as decisive, though their authority only extended to the calling in of evidence in case of a difference of opinion between them as to

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(*b*) *Fetherstone v. Cooper*, 9 Ves. 68.

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value. By the terms of the reference Hartley was not to be made an umpire. Again, though his opinion was to be asked as to the value of the stock, there was no authority to enable the arbitrators to take it upon the partnership accounts, the value of the shares of the concern, or the other matters in difference, or the question of the injury suffered by the Plaintiffs from the conduct of William Wallace.—[Lord *Plunkett*: This point was not made in the court below.—Lord *Brougham*: Can you show, as any part of the order of reference, where the power to call on the valuer is restricted to the taking the value of the stock?—The power to call him in was given only with reference to that subject, and therefore was impliedly restricted to it.

Mr. *Bickersteth* and Mr. *Lynch*, for the Respondent:—The object of the bill was unfairly to get rid of William Wallace out of the partnership, and the object of taking the accounts at all was to ascertain the real value of the share of William Wallace. Explanatory affidavits respecting the award have been, by desire of the Master of the Rolls, laid before him, and he having had a full discussion of the case, was satisfied that there was nothing to impeach the conduct of the arbitrators, and he therefore gave them their costs of appearing; Hartley was rightly consulted as to all the matters in dispute.—[Lord *Lyndhurst*, C.: An arbitrator has, without any special provision, a power to call in a valuer; when a special provision is made, his power in that respect ceases to be a general power arising from the necessity of the case; must it not, then, be governed by the terms of that provision?—That has been done here. The arbitrators have not in the least degree exceeded the powers

given them under the order of reference. The next point is, that the accounts as made out are not authorised by the decree. If they had been made out differently it would have been impossible to ascertain what was the value of William Wallace's share in the concern.—[Lord *Lyndhurst*, C.: The question before the arbitrators was, what was the value of the partnership property; that depended, of course, on the profits and expenses; the investigation was therefore necessary, for the purpose of ascertaining what the value of that property was, and that value could not be ascertained without a knowledge of the gains and the outgoings.]—The authorities to justify such an inquiry, under such circumstances, are numerous. There is no foundation for the objection to the calling in of Hartley on the general question of the profits and expenses. What then is the other objection in this case? It is said that the arbitrators held an *ex parte* meeting.—[Lord *Lyndhurst*, C.: We are all satisfied upon that point. There is nothing in that objection. An arbitrator has a right to call in one of the litigant parties, and say, do you admit or dispute any particular item? If the party admits it, there is no need of its being proved; if he disputes it, then it must be made the subject of examination and evidence.]—The only remaining objection is that which relates to the alleged adoption of the opinion of Hartley by the arbitrators. If that was true, it would not vitiate the award. In *Emery v. Wase* (c), upon a similar question coming before Lord *Alvanley*, he said (d), “One objection made is, that the arbitrator did not exercise his own judgment about the timber. That alone is not sufficient to prove the award bad; for a man may make use of the judg-

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(c) 5 Ves. 846.

(d) 1b. 848.

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ment of another upon whom he can depend, and the valuation of that person is his if he chooses to adopt it." But here the arbitrators formed their own opinion, and only stated that Mr. Hartley's concurred with theirs; a circumstance which was satisfactory to their minds, as he was a man of experience in the particular matters in which he had been consulted.

Mr. *Kindersley*, in reply :—The award is still open to objection, from the circumstance of the party himself having been examined at an *ex parte* meeting. An erroneous impression seems to have been formed as to the nature of what William Wallace did say when thus examined; but at all events, his examination upon any point whatever in the absence of the other parties was a great irregularity, and is sufficient to vitiate the award. The arbitrators had no right to call in the assistance of Hartley for anything but the valuation of the property.—[Lord *Lyndhurst*, C.: The valuation of the property is a matter which depends on many others. He could not well value the property without going into the calculation of profits and expenses.]—As to the adoption of the opinion of Hartley by the arbitrators, the case of *Emery v. Wase* does not furnish an authority for what they have done. The remark quoted from that case was merely incidental, and the case itself was decided upon a totally different point.

37 March. Lord *Lyndhurst*, (C.):—In this case many objections have been made and disposed of as the argument has proceeded. One point remains on which your Lordships have taken time for consideration. That point is, whether the arbitrators have properly conducted themselves in the proceedings under this

reference. By the terms of the reference, they were employed to value the stock in trade of W. Wallace, who was one of the proprietors of this partnership concern ; and they were also empowered to set a value on his share in the partnership, and on the expense of running the Waterford mail from a time mentioned in the submission. With respect to the two first points, they desired to call in the assistance of a valuer, but they were not, in terms, authorized to do so ; with respect to the third, their object was stated, and they did call in a valuer. They declared, that the expense of running the Waterford mail was to be taken at 2 s. 6 d. the double mile, and that their estimate upon that point was founded upon the opinion of Mr. James Hartley. This declaration is stated as one of the grounds for setting aside the award. I do not think that on this ground alone there is any reason for setting aside the award ; for they state their opinion on the question, and say, that in that opinion Mr. Hartley concurred. This case is not so strong as that which was before Lord Alvanley (e), and there that learned Judge said, " One objection made is, that Bishton did not exercise his own judgment about the timber. That alone is not sufficient to prove the award bad ; for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he chooses to adopt it." But that is not all here, for these arbitrators had the authority expressly reserved to them to call in a valuer as to the shares of the partnership. Now, it was impossible to come to a conclusion upon that point without an estimate of the expenses of the concern, part of which was the running of the Waterford mail. The arbitrators must, therefore, have considered themselves

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(c) Emery v. Wase, 5 Ves. 846.

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authorized to have assistance upon that point, for the purpose of inquiring into that expense. So that, on both these grounds, I am of opinion that there is no reason for setting aside the award. Then, another objection taken is upon the form in which the accounts have been made out by the arbitrators; but it seems to me that that mode of statement is perfectly correct. Both as to the principle which is to govern the calculation of the accounts, and the mode in which they are stated, I am of opinion that there is no ground for disturbing the award; and I therefore move that the judgment be affirmed.

Lord *Brougham* :—The first objection made to this award was, that evidence had been taken behind the backs of the parties; but the more that objection is examined, the less does it appear to me worthy of consideration. The Court below gave the arbitrators the costs of appearing, which it would not have done if it had considered that they had conducted themselves improperly. The Master of the Rolls did not mean to say that they had misconducted themselves. They called William Wallace before them, and asked him if he admitted certain items in the accounts. Such as he did admit, they put down as admitted; and it is not because he added any words upon other matters, words that they did not attend to, that their award is to be impeached. There is no objection taken to Mr. Hartley's assistance in examining the accounts. A professional arbitrator would have examined him as a witness, which would have been the more regular and advisable course. The case in the 8th Vesey goes further than the present, and fully supports the principle on which my opinion is founded. I have no manner of doubt that this decree should

be affirmed. The Lord Chancellor has not moved for costs with the judgment, but I think that they ought to be given.

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Lord *Plunkett*:—I may perhaps be permitted to state the grounds on which I set aside the judgment of the Master of the Rolls. I pronounced two orders, one setting aside an order of His Honor, which had itself set aside the award; and the other was on application for a decretal order to be pronounced by me for carrying this award into execution. I felt that if I could not have set aside the order of the Master of the Rolls, great injustice would have been done; and His Honor agreed with me on that point. I thought that the calling on Hartley for assistance was within the scope of the powers of the arbitrators, as they were to have assistance in settling the shares of the partnership. I have traced that case in 8th Vesey, and I find that it first came before Lord Alvanley as Master of the Rolls, and his judgment was reported (*f*). When it afterwards came on appeal before Lord Eldon, Sir Samuel Romilly, who argued against the award, admitted that an arbitrator might take the advice of another, but not delegate to that other his authority. The arbitrators have done no more here than it was there admitted that they might do. One other point has been started here which was not mentioned in the Court below, namely, the mode of the statement of the accounts. It seems to be supposed that a court of equity is strong enough to take property from a party, but not strong enough to restore it to him when it has been improperly taken: I think that that is a mistake. I concur with your Lordships in affirming the judgment, and I think that it should be affirmed with costs.

Affirmed with 100 *l.* Costs.

(*f*) 5 Ves. 846.



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## APPEAL

FROM THE COURT OF CHANCERY.

RICHARD WHITE, FRANCIS JENKS  
BURLTON, VINCENT WHEELER, and } *Appellants.*  
JAMES EYSAM GRAHAM - - - }

JOB WALKER BAUGH and THOMAS BEALE, *Respondents.*

*Receiver.* A receiver cannot be permitted to enter into any agreement with his sureties by which he, in effect, indemnifies them against any loss that may accrue from his dealing with the receivership fund. The security for his good conduct must not be worked out of the estate itself.

Nor can he be permitted to put the fund entrusted to his care under their control or the control of any person appointed by them, but must retain the complete control over it in himself, so as to be able to act with promptitude on any emergency.

It makes no difference in such a case that the arrangement between the receiver and his sureties has not been the direct cause of a loss, nor that neither of them has obtained any personal advantage from it.

Where an order has been made in a cause directing a receiver to pay the fund to a particular person, and that person dies, the receiver is not bound in the first instance to take out a representation to the deceased, nor to apply to have the order revised; it is sufficient for him to keep the money in the custody in which it was originally placed, until the state of the proceedings in the Court enables him to pay it over.

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IN the month of August 1820, the Appellant, Richard White, was proposed, and was subsequently appointed to be receiver of the estates of John Salwey, esq., deceased, in a cause of *Salwey v. Salwey*, then depend-

ing in the Court of Chancery. Under the order by which he was appointed, he was directed to pay his balances from time to time into the Bank of England, in the name of the Accountant-General of the Court of Chancery, to the credit of the cause.

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Upon White's appointment he was required to find two sureties, and the Appellant, Francis Jenks Burlton, and William Adams (since deceased), who is now represented by his executors, Wheeler and Graham, became such sureties, and entered into a recognizance, dated the 10th of November 1821, in the penal sum of 8,000 £., and drawn in the usual form.

The sureties, with a view to their own security, stipulated with the receiver that the monies he should receive in his character of receiver should be lodged in some bank in the names of the sureties, and that all monies to be applied for the purposes of the receivership should be drawn for by cheques, to be signed by the receiver, Richard White, and to be expressed to be "On account of the trustees of the late John Salwey, esq.," and they further required that Mr. Anderson (who was a solicitor in partnership with Adams) should be at liberty to attend with the receiver on the rent days for the purpose of ascertaining the amount received, which amount should be afterwards paid into the account to be kept with the bankers. These stipulations were acceded to by the receiver, and an account was accordingly opened in the names of the sureties with the firm of Prodgers & Co. of Ludlow. There were some incumbrances affecting the testator's estates which bore interest, and the bankers had a general authority to pay such interest to the parties entitled to it without drafts being drawn for the same; but with that exception, the bankers had no authority to pay any money on account of the

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receivership, except the same was drawn for by drafts signed and described in the manner above stated ; and they never did pay except on drafts in that form. All monies received on account of the receivership were paid into the bank of Messrs. Prodgers until they became bankrupts, which happened in December 1824, at which time there was a balance of 1,464*l.* 2*s.* 2*d.* in their hands on this account. Up to the time of their bankruptcy Messrs. Prodgers were in perfectly good credit and repute, and Mr. Richard Salwey, the person then entitled to the produce of the estates, himself kept a banking account with them. The sum of 1,464*l.* 2*s.* 2*d.* was proved under their commission as a debt due to the receiver. Soon after the failure of Messrs. Prodgers an account was opened with Messrs. Coleman, Morris & Sons, of Leominster, in the names of the said sureties, and the same arrangements were made as before with respect to the payments of interest and of the drafts of the receiver.

An account was also opened by White with Coleman and Wellings of Ludlow, bankers, but this was not opened in the names of the sureties ; it was headed "An account between the firm and the trustees of the late John Salwey, esq.," but no arrangement at all was made between the receiver and his sureties with respect to the monies placed in this bank as had been made with respect to the monies placed in the other two banks.

Both these banks were in good credit at the time the accounts were opened, and until the month of March 1826, when they both failed. The balance of receipts up to Midsummer 1824, in the bank of Coleman, Morris & Sons, at the time of their failure, was 1,120*l.* 5*s.* 5½*d.*, and that with Messrs. Coleman & Wellings was 259*l.* 2*s.* 8*d.*

This sum of 1,120*l.* 5*s.* 5½*d.* was proved under the commission against Coleman, Morris & Sons, in the name of Burlton, and the other sum of 259*l.* 2*s.* 8*d.* was proved under the commission against Coleman & Wellings by White.

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The whole amount of balances of receipts to Midsummer 1824, in the hands of the three banking houses, was 2,843*l.* 10*s.* 3½*d.*

On the 6th of August 1824, an order was pronounced on petition, whereby White was directed to pay to Richard Salwey, who was entitled to the rents and profits of the said estates for his life, the sum of 617*l.* 17*s.* 7*d.*, being the balance reported due from him on the passing his accounts to Midsummer 1822, and whereby the receiver was also directed to pay the future balances upon his subsequent accounts up to Midsummer 1824, as the same should from time to time be reported due from him by the Master, as such receiver unto the said Richard Salwey.

On the 20th of July 1824, the sum of 617*l.* 17*s.* 7*d.*, which was the actual balance reported due from the receiver to Midsummer 1822, together with 164*l.* 19*s.* due for costs, was by a draft transmitted to Mr. George Henry Dansey, the London agent of Adams & Anderson, with the following letter addressed to him:

“ Dear Sir,

“ *Re Trustees of John Salwey, Esq.*

“ We send you enclosed a draft for 782*l.* 16*s.* 7*d.*, being the balance of Mr. White’s account as receiver, up to Midsummer 1822; you will, as before, pay 617*l.* 17*s.* 7*d.*, part thereof, into Court to the credit of the receiver, and 164*l.* 19*s.*, residue, to Messrs. Still, Strong & Rackham. Be so good as to acknowledge the receipt, and send us the vouchers as soon as you have procured the same.”

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Mr. Dansey, on the 22d of July following, paid the said sum of 164 *l.* 19 *s.* as directed by the letter, and at the same time requested Messrs. Still, Strong & Rackham, who were the solicitors for the trustees of the estates, to give him directions as to the paying into Court the sum of 617 *l.* 17 *s.* 7 *d.*

Mr. Dansey was informed by them that the agents of Mr. Salwey had requested that the sum of 617 *l.* 17 *s.* 7 *d.* should not be paid into Court, but should be paid to Mr. Salwey, and that a petition for that purpose was about to be presented, and they requested him to hold the money, as they had no directions for paying the same into Court.

This was communicated to Adams & Anderson, who repeated their directions to Mr. Dansey for payment into Court of the sum of 617 *l.* 17 *s.* 7 *d.* Mr. Dansey again called on Messrs. Still, Strong & Rackham, when they informed him that an order had been pronounced for payment of the money to Mr. Richard Salwey, and that they would send the order to Mr. Dansey with a receipt from Mr. Salwey for the sum of 617 *l.* 17 *s.* 7 *d.*

Neither this order nor the receipt was ever sent to Mr. Dansey, and in April 1825, he paid the sum of 617 *l.* 17 *s.* 7 *d.* to the account of Adams & Burlton, with Messrs. Coleman, Morris & Sons, of Leominster.

Neither the receiver nor his sureties knew of this order until after the death of Mr. Richard Salwey, which happened on the 5th of February 1825, and it does not appear that the order was in fact drawn up in his lifetime; but the agent of the receiver having had notice of the order of the 6th of August 1824, was sufficient to prevent his paying his balance into Court.

Richard Salwey died in February 1825, but the

Respondents did not prove his will as executors till February 1827, and in the meantime no revised order was obtained, either by White or by any other person for payment of the monies directed by the order of the 6th August 1824, to be paid to Salwey.

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On the 26th of July 1827 the Respondents, as the executors of Salwey, presented their petition to the Master of the Rolls, (Sir John Leach,) and thereby prayed "That it might be referred to the Master to compute interest on the sum of 2,843*l.* 10*s.* 3  $\frac{1}{2}$ *d* from the time when the same ought to have been paid by White, and that White and the executors of William Adams and Burlton, might be ordered within a month to pay the sum of 2,843*l.* 10*s.* 3  $\frac{1}{2}$ *d.* and interest to the petitioners, and, if necessary, that the receiver's recognizance might be put in suit for the purpose of compelling these payments.

The Master of the Rolls, on the 29th of November 1827, dismissed the petition as against the Appellants Burlton, Wheeler and Graham, with costs, and referred it to the Master to take an account of the several dividends which had been received on the sums proved under the commissions of bankrupt against Prodgers, Coleman & Wellings, and Coleman & Wallis, and that White should, out of what the Master should find to have been paid to him on account of such dividends, pay and retain certain costs thereby awarded, and that White should pay the residue thereof, and all future dividends to be received on the several sums thereinbefore mentioned, as the same should, from time to time be received by him, to the petitioners, and that he should assign all such future dividends to the petitioners, if required by them so to do, such assignment to be settled by the Master to whom the cause

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stood referred in case the parties differed about the same.

From that decision the Respondents in the present appeal presented their petition of appeal and rehearing to the Lord Chancellor, before whom the same was heard on the 8th of February 1831, and on the following day the Lord Chancellor ordered that the order of the 29th November 1827 should be reversed, and that it should be referred to the Master to compute interest upon the sum of 2,843 *l.* 10*s.* 3½*d.*, the balance due from White, the receiver, after the rate of four per cent. per annum, from the time the same ought to have been paid by White, and that the Appellants, Richard White, Wheeler, Graham, and Burlton, within a month from the date of the Master's report, to be made in pursuance of that order, should pay to the Respondents the sum of 2,843 *l.* 10*s.* 3½*d.*, and what the Master should certify to be due for interest thereon, and in default thereof the Respondents should be at liberty to put the recognizance of White and his sureties in suit.

This order was the subject of the appeal now before the House.

Mr. *Knight*, and Mr. *Lowndes*, for the Appellants:—The order here goes beyond the principle of any former decision. The principle on which Courts of Equity have always proceeded in cases of receivers is, that if such receivers have dealt honestly with the money entrusted to them as a prudent man would deal with his own, they shall not be charged with a loss. The Courts have always acted upon this principle, because they have always treated a receiver like any other trustee or agent. Suppose, then, that

this had been the case of a private receiver, he would not have been liable to make good the loss occasioned by the failure of these bankers. If he had been the agent of a landed proprietor to whom he had given sureties for the due payment of the rents received, and had paid these rents into the banker's, more especially if, as in this case, those bankers had been the bankers of his principal, nobody can pretend to say that he would have been liable when they failed. It can be no objection to him that he entered into a contract with his sureties, by which he was prevented from drawing cheques for any part of this receivership fund to answer his own private purposes.—[*Lord Brougham*: Would he not, even in the case you have put, be clearly liable, if he mixed the money with his own?]  
—Certainly he would; the cases all establish that proposition, because the rule is, that if he gains any advantage, direct or indirect, from it, he must be responsible for loss. But there, again, the same rule is applied to a receiver of the Court and to a private agent or trustee.  
—[*Lord Brougham*: Then do you contend that there is no distinction whatever between these two classes of persons?]  
—There is no distinction between them: a receiver is merely the steward of the Court, and is to be dealt with like any other steward.—[*Lord Lyndhurst, C. (a)*: In the case of a private agent or trustee, does any mere irregularity of conduct make out a claim against him without proof of some actual damage arising therefrom? Does the same rule apply to a receiver?]  
—That may depend on the special circumstances of each particular case. In *Knight v. Lord*

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(a) This case was argued while Lord Lyndhurst was Lord High Chancellor, but the judgment in it was given after he had resigned the custody of the Great Seal.



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*Plymouth* (b), a receiver was exonerated from liability though he had transmitted the money in an unusual manner, in consequence of which the loss occurred, it being proved before the Master that he had so transmitted it with a view to the benefit of the estate, and for no other reason.—[Lord *Lyndhurst*, C.: Lord Eldon expressed his dissatisfaction with that case in *Wren v. Kirton* (c)].—There is no case in which the principle laid down in *Knight v. Lord Plymouth*, as reported in *Dickens* (d) is expressly dissented from. On the contrary, it is distinctly recognized and acted upon in *Rowth v. Howell* (e), and Lord Rosslyn there calls it (f) “a very strong case.” If the receiver had mixed this money with his own it would be difficult to say that he was not liable; for there the rule as to his obtaining an advantage would apply; as he might thereby increase his own credit, and prevent the necessity of keeping in the hands of his bankers a large balance of his own money. In such a case the private agent or trustee would, if he made the trust money subservient to his own convenience, be liable in the same way that a receiver is to the Court. It is admitted that a private receiver would not be liable unless some mischief accrued directly in consequence of his irregularity. It is the same with a receiver of the Court, and the case of *Rowth v. Howell* fully supports that principle. It is not pretended that the loss accrued in consequence of what the Respondent White did in this case. It was necessary that the money should be deposited with bankers for safe custody, and neither White nor his sureties applied any part of the receipts to other than

(b) 3 Atkins, 480.

(c) 11 Ves. 377.

(d) 1 Dick. 120.

(e) 3 Ves. 565.

(f) Ib. 566.

the receivership purposes. The arrangements made with regard to the cheques did not give any advantage to the receiver or his sureties beyond that of enabling the sureties to prevent the receiver, if he were so inclined, from improperly dealing with the trust monies. Upon that arrangement they ought not, therefore, to be held liable; but at all events they cannot be liable upon the whole of the sum claimed, for the monies placed in the bank of Messrs. Coleman & Wellings were not affected by this arrangement, and those monies at least must be exempted from the operation of the Lord Chancellor's orders. There is no reason to complain of the conduct of the receiver in not paying these sums into Court; for by the order of the 6th August 1824, the receiver was prevented from paying his balances into Court, and by the death of Richard Salwey, and the fact that no administration was taken out for Richard Salwey's estate, he was prevented from paying them over to any person interested or authorized to receive them. Now *Adams v. Claxton* (g) shows that a trustee is not to be charged with a loss occasioned by the failure of the banker of the agent in whose hands the money is deposited, pending a transaction for the change of trustee. The principle there laid down applies to the present case; and the receiver cannot be charged with a loss accruing while he was prevented by the order of the Court, or by the death of the party, from dealing with the money otherwise than he did. On no ground, therefore, can the order be supported as it now stands.

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Mr. Wakefield for the Respondents:—The real objection to the agreement between the receiver and the

(g) 6 Ves. 226.

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sureties is, that it deprives the receiver of the control which he ought to have over the fund entrusted to his care. In that respect, therefore, the receiver was not treating these trust monies as he would have treated his own. So that taking the argument of the other side to be well-founded, it is clear that the receiver is responsible for the loss; for no prudent man would leave his own monies so completely under the control of a third person, that, happen what might, he could not withdraw them from the bankers where they were placed, nor put them into safer custody, unless that third person chose to consent to his doing so. It is not necessary to prove here that the receiver or the sureties obtained any personal advantage from their manner of dealing with the trust fund; for it is quite clear that by keeping so large a balance at the banker's the estate was exposed to loss. If the receiver has acted irregularly he has become responsible to the Court. The principle stated in *Knight v. Lord Plymouth* (*h*) has been in effect overruled by Lord Eldon in *Wren v. Kirton*, where his Lordship said (*i*) "I should not much fear to contradict that case of *Knight v. Lord Plymouth*, upon what has been done by later authority, if it is as represented, for nothing is more dangerous." A receiver appointed by the Court does stand in a very different situation from a private trustee, and the same indulgence is not to be extended to the former as to the latter. This distinction has been taken in all the cases. The receiver here kept larger balances than he ought to have done in the hands of the bankers, and the failure of one taught him no caution with respect to the others. This alone is a ground for making him responsible. As to the argument raised upon the death of R. Salwey, and the

(*h*) 3 Atk. 480.

(*i*) 11 Ves. 380.

absence of any one who had taken upon himself administration of R. Salwey's estate, no excuse for the receiver can be founded on that circumstance; for the receiver might have applied to the Court for orders to enable him to pay the money into the bank, in trust in the cause. The money in the hands of Messrs. Morris and Coleman, as much as any other portion of the fund, has been lost by his neglect to do this, and in every respect, therefore, he is liable to make good to the estate the sum which has thus been lost by the bankruptcy of the bankers whom he imprudently trusted.

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Mr. *Knight*, in reply :—The case of *Knight v. Lord Plymouth* was not overruled by Lord Eldon, who merely intimated a doubt whether he should have gone as far as Lord Hardwicke was represented to have gone in that case. It was recognized and acted upon by Lord Chancellor Rosslyn in *Rowth v. Howell*; and in *Massey v. Banner* (*k*) it was cited in argument before Sir John Leach, who expressed no dissent from its principle, but decided the case then before him on circumstances which rendered that principle inapplicable. If a different rule is now to prevail, there will be the greatest difficulty to obtain receivers; for no man will take upon himself an office in which he is to labour under a far greater responsibility in respect of the property of others than can be satisfied by his taking the same care of it as of his own.

Lord *Brougham*.:—My Lords, In this case Richard White being appointed receiver of the rents of the estates of Salwey's executors, was required to find the usual sureties, and he proposed William Adams and

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(*k*) 4 Madd. 413.

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James Burlton, who were approved of, but it afterwards appeared that, in order to obtain the suretyship of these persons, and particularly of William Adams, he had come under an engagement that the rents and profits of the estate should be paid in to an account to be opened in the names of the sureties, with Messrs. Prodgers, bankers in Ludlow, and that the money in this account should only be drawn out by cheques to be filled up in the hand-writing of George Anderson, William Adams's partner. George Anderson used generally to attend the audits and receive the rents, as White collected them, and used to pay them into the bank. Messrs. Prodgers were also the bankers of the sureties, who kept, accordingly, their private account with them, and the rents were carried to the account of Adams and Burlton, the sureties. The bank broke soon after the panic of 1825-26, and a loss of 1,464 *l.* was incurred. The account was then transferred on the same terms and conditions to the bank of Coleman and Morris, and also, though not on the same conditions, to the bank of Coleman and Wellings, and both these broke, with a further loss in both of 1,379 *l.*; in all a loss of 2,843 *l.* to the estate.

The question is, whether or not the receiver is answerable for this loss; and we may, in the first place, lay out of view the allegation that too great a balance was kept by the receiver in the bank, because an order had been made to pay the money to Mr. Salwey's account, and this on the death of Mr. Salwey could not be altered for want of a representative; the executors not having proved, there was no administrator. I lay this consideration out of the case only because there is no necessity for deciding upon it, and by no means because I would have it to be understood that a receiver is free from the duty of

bestirring himself in such circumstances, if he could obtain, through the Court and through the ecclesiastical authorities, the means of supplying the representation, so as to have the order altered, and the money paid into Court. It is unnecessary to decide one way or the other on this part of the case. The main question is, whether or not the arrangement as to the drawing and filling up the cheques made the receiver answerable, supposing he incurred no responsibility from the amount of the balance remaining in the bank, and supposing no other neglect or default to have been committed in guarding the fund.

Now, it is clearly the duty of the receiver, as an officer of the Court, to keep in his own hands the control over the fund. It is admitted that if he had parted altogether with that control he would have been answerable, whether the loss actually incurred could be traced to and connected with that severance and that want of power over the fund or not. Does it make any difference, that instead of entirely parting with the control he gave a *veto* on all his dealings with it to a mere stranger? The surety's partner, George Anderson, was wholly unknown to the Court, which reposed its confidence in its own officer, the receiver, and looked only to him. The acts of a stranger it had no power over, and could in no respect control or punish.

Consider the position of the fund. Had a sudden run come upon the bank, White, on hearing of it, would have been bound in discharge of his official duty, his duty to the Court, instantly to draw the whole balance out, and put it in a place of greater safety. But the arrangement which he had made prevented him from doing this without the concurrence of Adams's part-

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ner, Anderson, who lived at some distance, and who, even had he lived in the same town, might have been absent or unable from illness to act, and who, had he been both on the spot and able to write the cheques, might have been unwilling and might have refused. He might have been disposed to court the favour of his own bankers at the risk of this particular estate. He might have drawn out all his own money, and recompensed the bankers by leaving in that of the receivership. In order to prevent a run, which would endanger his own safety in the bank, he might have exposed the receivership fund to jeopardy, and all this he might have done without incurring the least risk himself; for he was not surety, nor in any way bound either to the Court or to the receiver. But without making any such supposition, and simply considering the provision made for the cheques being all drawn by Anderson, only let us ask ourselves how any individual would like, during a run upon his banker, to have his hand paralyzed by such a *veto* as was given to Anderson; what anxiety would he feel during the delay that must elapse in the interval between the run beginning and the messenger returning with the cheques filled up for his signature. Is a receiver entitled to place the custody or administration of the fund in a situation which in the case of any individual dealing with his own estate would be the source of such anxiety? Again, no person in his own case would make such an arrangement without extreme necessity or ample equivalent. Has any receiver a right to treat the estate committed to his management, and for the management of which he is answerable to the Court, and is paid by the estate, in a situation in which neither he nor any one else would

voluntarily place his own property? Assuredly the least that can be required by the Court of its officers is that degree of diligence and care which any man would use in the conduct of his own affairs, and which, accordingly, the law expects and exacts from persons acting as agents for certain pay and reward in the affairs of others.

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But we have been considering the case as it would have stood if the *veto* had been given to a stranger, and without any regard to the receiver's own interest, or without a view to any benefit accruing thereby to himself; this was not, however, the case here. The *veto* was given to the surety's partner, and the receiver was then enabled to obtain his suretyship. Now the Court has a right to a security quite independent of the receivership, and not a security which is to be as it were worked out of the estate itself. No one would find it a very hard matter to get a surety if he could give him a control over the funds. The receiver, who is paid his poundage, ought to be a person so honest and of such a character for honesty as to obtain security without any such contrivance; a knave might become a receiver, and obtain sureties on such terms; for he puts into his surety's hands the power of preventing the money going out of his own. Thus a knavish surety and a dishonest receiver might join in robbing the estate. But without putting such a case it is enough to say that the Court might, all the while, believe that one man had become bound for the good conduct of another when he had, in fact, given no such pledge, nor incurred any risk whatever. There is a deception thus practised on the Court, which is induced to believe that a receiver's honesty has been vouched for when it has not.

Again, an interest is given to the surety or his



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partner to court the bankers, by keeping the balance of the estate large, and thereby obtaining accommodation on his own private account; surely no such risk should be run, and any benefit derived from the account should rather go to the estate than to a stranger. But if it be said that the surety can only put the receivership fund in jeopardy at his own risk, because the loss will certainly fall on the receiver and himself, if it can be traced to the balance being left too long in the bank or other place of deposit; then I answer that there are three considerations sufficient to destroy the whole force of this observation. First, in this case it was not the surety, but his partner, who had the *reto*. Secondly, neither the surety nor the receiver might have been made liable, although their *lâches*, in not removing the balance, might have caused the loss; for there might have been the greatest difficulty in tracing the connexion between the loss and the arrangement, or in proving the *lâches* of themselves to have caused the damage, or in proving their knowledge of the run on the bank; and Thirdly, and chiefly, supposing no such difficulty to exist, the Court and the estate have a right to be guarded against all risks which would call in the aid of the surety, or indeed of the receiver himself; for it is by no means right to say, "If the bank breaks, and the receiver and the surety have been negligent, we come upon them." They may be both insolvent as well as the bank; they may be broken by the very failure of the bank; and it is a far more safe thing for the fund that it should not be hazarded at all than that it should be hazarded, and the surety and his principal, the receiver, resorted to in case of a loss. Any man had much rather that his money was kept away from the fire than to be told that, in case of its being burned, he may resort to

the guarantie or the liability of the man who is sporting with it. His answer would be, "It is better not to risk it at all." Now, whatever arrangement risks the fund, makes it more likely that the Court shall have to come upon the receiver and his surety for a breach of duty, for which the receiver is answerable. Here there was no kind of necessity for the arrangement in question ; but it was advantageous to the receiver in the same degree in which it was detrimental to the estate.

What has been said may seem to meet any arrangement raised upon the circumstance, that the *veto* and joint control are not proved to have occasioned the loss. It must be observed that we never can be quite sure of this ; and if parties placed in the situation in which this arrangement put these gentlemen, are to be secure against paying, unless they can be shown to have known of the run, or other dangers attending an investment, they will not be half so curious in their inquiries as they would be in their own case. But independently of any such consideration, it is to be remarked, that on all hands it is most explicitly admitted that the receiver, wholly parting with the control of the fund, would have made himself answerable, whether the loss had arisen from that cause or not. This rather differs, therefore, in degree than in kind from such a case. He relieves himself from the fetters imposed upon his own custody and management of the fund, by sharing that management with another, and giving that other as much power over it as himself ; such power, indeed, that without filing a Bill in Equity and obtaining an order of the Court, he had no means of drawing out one shilling of the fund if the person entrusted with the *veto* refused to permit him to do so. Nay, he had deprived himself of the power of

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obeying any order that the Court might make respecting the fund.

If it be said that the principle of this decree presses hard on receivers, and will discourage men from undertaking the office, I answer, first, that this is no matter for the Court's consideration, because the office is one of emolument, and therefore we are not to deal with it as with the office of a trustee; and, secondly, that nothing here decided can discourage from coming forward honest and solvent men who mean to perform their duty strictly, and to give the estate the security it has a right to, and to treat the Court with perfect fairness; and such are the persons whom it is best to have for receivers.

I am of opinion, therefore, on the fullest reconsideration of this case, that it was rightly decided, and I have only entered into the arguments upon it now, because the principle is important, and because my reasons, as given below, are not reported. The case was decided when, from the pressure of business, I had not been able to adopt the plan which, for the last three years of holding the great seal, I always pursued of writing my judgments at length.

I ought to mention that I have had an opportunity of consulting upon this case upon the point which alone raised any doubt in my mind, namely, the connexion between the loss and the arrangement made, the other heads of the Courts of Equity, and that I find they entirely concur in the opinion I had formed. I shall therefore move your Lordships that the judgment of the Court below be affirmed. With respect to costs, however, it appears to me that this is not a fit case for costs, because it was a reversal of the decision of the Master of the Rolls. It is true that that is not always a sufficient reason, still, in addition

to that, there is no direct authority going the length of this case; and therefore though, on consideration, I see no reason for altering the opinion I before expressed, I think it is a very fair case to be subjected to the consideration of this House.

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Lord *Lyndhurst* :—My Lords, I shall only say a few words on this case. I entirely agree with the opinion formed by the Noble and Learned Lord, that the judgment of the Court below ought to be affirmed. Here was a large sum of money received by the receiver; for that sum of money he was accountable to the Court and to the parties; he applied to be relieved from that liability, because he said the loss had been occasioned without any fault of his. The objections to that application were twofold; the first objection was, that he ought not to be relieved, because he improperly delayed in passing his accounts, and because he allowed a large sum of money to remain in his hands; and it was in consequence of such conduct that the loss was occasioned. The second is an objection which has been more insisted upon by the Noble and Learned Lord, namely, that he improperly dealt with the fund.

Now, with respect to these objections, it appears that in the year 1822 the account was made up to the summer of that year; when that account was passed a considerable balance, amounting to about 700 *l.*, was found to be due; the receiver had that balance in his hands; he remitted that money to London, and his agent there offered that money to the party; the party desired that it might not be paid into Court, because he said “I am about to make an application to the Court to have the money paid over to Mr. Salwey, who is beneficially interested.” Notwithstanding that,

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he again applied to pay the money into Court, and he was told that an order had been actually obtained ; but before that order was entered, and before all these proceedings had taken place, Mr. Salwey himself died, and in consequence of his death there was a suspension of all the proceedings. It became necessary, then, that the order should be revived for the purpose of paying that money to the representatives ; no other order, however, was ever obtained, in consequence of which the agent in London remitted the money back to the country, that it might be deposited with the bank from which it had been originally drawn. It appears to me that, under these circumstances, there is no fault whatever attributable to the receiver as to this part of the transaction ; that he was not bound, in the first instance, to take out a representation to the deceased, and was not bound to apply to have the order revised ; it was sufficient for him to keep the money in the custody in which it was originally placed, until the state of proceedings in the Court was such as to enable him to pay it over. It appears to me that if there was any neglect imputable to either party, it is to those parties who were to take out that representation, and who are now the parties to make complaint.

With respect, however, to the second point, it appears to me that he improperly dealt with the fund. My Noble and Learned Friend has stated the particulars. When he was appointed receiver he applied to those two individuals, Adams and Burlton, to become his sureties ; they declined becoming his sureties upon the ordinary terms ; they said, We will become your sureties only on this consideration, that the money shall be paid into our banker's in our joint names, and shall not be drawn out except by a cheque signed by

you, the receiver, but drawn in the hand-writing of Mr. Anderson, the partner of one of us. That arrangement was obviously to give them control over the fund; I apprehend that that was entirely irregular; the receiver ought to have had the absolute control over the fund, for the purpose of applying it whenever it became necessary to the purposes of the trust. Such a condition leads to a great deal of abuse; in the first instance, to the abuse suggested by my Noble and Learned Friend. The sureties might have private accounts, as one of them had in this case at the bankers'; they might have been disposed to serve the bankers by having a large balance upon the trust fund for as long a period as possible in the hands of the bank. Again, the object of having sureties is, that the sureties may look to the conduct of the receiver, and compel him actively to perform his duties, and pass his accounts. But by the course of proceeding adopted in this case, it was a matter of indifference to them whether he did his duty or not. They did not say, as they would in an ordinary case, "Have you passed your accounts and paid in your balances?" because they wished that the balances might remain deposited in the hands of the banker. And last of all,—which has already been commented upon,—an emergency might arise, and it might be necessary to draw out the money on a sudden, and the party situated as the receiver was, could not do that; he must go and apply to the surety, and ask the latter to co-operate with him, and in consequence of that delay the fund might be absolutely lost. It appears to me that the manner of dealing with the fund was most irregular.

But then it was pressed in the argument, that the loss did not arise from that circumstance. That, however, appears to me a point altogether immaterial.

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The party who is paid for the discharge of his duty comes to be relieved from his liability. The Court says, "You cannot be relieved from your liability unless your conduct has been strictly regular, whether the loss has been occasioned by the irregularity of your conduct or not." Cases were cited at the bar, and it might be sufficient to refer to the ordinary case where a receiver mixes the trust-money with his own money at the banker's; the banker fails; the receiver is obliged to make good the loss. Why? Because he ought not to have mixed the trust-money with his own money, but to have placed it in a separate account (*a*). If it had been in a separate account this would not have taken place. In precisely the same way it is, because the party has conducted himself irregularly and improperly, that the Court will not relieve him here. The Court exercises the strictest vigilance over receivers; they are paid, be it remembered, for the performance of their duty; they are bound to perform that duty strictly, and when they come to the Court for a favour, the Court has a right to say, that they cannot have that favour unless their conduct has been strictly regular. In my opinion, the depositing the money in the banker's hands, subject to this control, which the receiver had no right to give to other parties, was an irregular proceeding, and he is not entitled to the indulgence of the Court, and the sureties must make good the loss. On these grounds I am of opinion with my Noble and Learned Friend, that the judgment (*b*) in this case ought to be affirmed, but without costs.

Judgment affirmed.

(*a*) *Wren v. Kirton*, 11 Ves. 337.

(*b*) See the case of *Salway v. Salway*, 4 Russ. 60. and 2 Russ. & Myl. 215. The latter was published after *White v. Baugh* had been sent to the printers.

## WRIT OF ERROR

FROM THE COURT OF EXCHEQUER CHAMBER IN IRELAND.

1835.  
13th & 14th  
April.CUTHBERT FETHERSTON's Lessee - *Plaintiff in Error.*THEOBALD FETHERSTON, Esq. - *Defendant in Error.*

Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their ordinary sense; or unless in the other provisions of the will there should be a clearly expressed intention inconsistent with the giving of an estate tail, and which intention can only be fulfilled by sacrificing the particular provision, and regarding the expressions as words of purchase. HELD accordingly, that under a devise to "W. F. and his heirs male, according to their seniority and their respectively attaining 21, the elder son surviving of the said W. F. and the heirs male of his body to be preferred to the second or younger son, and in case of failure of issue male of W. F. surviving him, or dying without lawful issue male attaining 21, then over;" an estate tail was devised to W. F.

Devise.  
Construction.

THIS was an action of ejectment, brought in the Court of King's Bench, in Ireland, upon a demise in the name of Cuthbert Fetherston, to recover possession of lands in the county of Westmeath, to which he claimed to be entitled as devisee under the will of John Fetherston.

The cause was tried at the Spring Assizes for the county of Westmeath, on the 5th of March 1830, before Lord Chief Justice Bushe, when it was agreed to turn the facts of the case into a special verdict.

The special verdict stated, that John Fetherston was, at the time of his death, seised in fee of certain lands.



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mentioned in the declaration, and was also seised as of freehold, for the lives of three persons still in being, of certain other lands also therein mentioned, and being so seised, he on the 26th of April 1827, made his will, duly attested to pass real estate, and thereby after making other devises and bequests, he gave and devised the premises in the declaration mentioned, with the appurtenances, in the words following :—

“ I give, devise and bequeath to my much respected kinsman, William Fetherston, and his heirs male according to their seniority in age, and their respectively attaining the age of 21 years, all my estates real and personal in lands, houses and tenements, not hereinbefore disposed of, the elder son surviving of the said William Fetherston and the heirs male of his body lawfully begotten, always to be preferred to the second or younger son, and in case of failure of issue male of the said William, surviving him, or their dying unmarried and without lawful issue male attaining the age of 21 years, then to Theobald Fetherston, brother of the said William, and his heirs male lawfully begotten, on attaining the age of 21 years, the elder to be preferred to the younger, and in case of the death or failure of issue male of the said Theobald, lawfully begotten, and their not attaining the age of 21 years, then to my right heirs for ever.”

William Fetherston died on the 3d of May 1829, leaving Cuthbert Fetherston his eldest son and heir at law.

On the 22d of June 1829, John Fetherston the testator died, leaving said Cuthbert Fetherston and Theobald Fetherston him surviving, and on the 1st of July 1829, the said Cuthbert Fetherston demised the land in question to a nominal Plaintiff.

The question raised upon the special verdict was,

whether upon the true construction of the testator's will the devise to William Fetherston was a devise to him of an estate tail, or a devise of an estate for life only to William Fetherston, with remainder in tail to his eldest son. If the Court should be of the former opinion, then by William Fetherston's death in the testator's lifetime the devise of the estate tail would lapse and the Plaintiff would take nothing; but if the devise was a devise to William Fetherston for life, with the remainder to his eldest son in tail, then the estate of William having lapsed, the remainder in tail to his eldest son would, upon the death of the Testator, vest in possession and entitle his eldest son (the now Plaintiff in error) to the possession of the estates in question by purchase. The Court of King's Bench thought that William Fetherston was entitled to an estate tail, and that Court therefore (on the 9th February 1831) gave judgment for the Defendant. That judgment was afterwards (13th June 1832) affirmed on error in the Court of Exchequer Chamber in Ireland. The Plaintiff then brought the present writ of error to this House.

Lord Chief Justice Tindal and others of the Judges attended the argument.

*Sir John Campbell* and *Mr. Jemmett* for the Plaintiff in error:—The true construction of this devise is, that William Fetherston took an estate for life, with remainder to his first and other sons successively in tail male. It is not denied that the very first words of the devise, "William Fetherston and his heirs male," appear to carry an estate tail, but they are so instantly followed by words which explain and qualify them, that no person can doubt that the devise to William Fetherston amounted to no more than a life estate.

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It is clear that an estate tail, apparently given by some words in a will, may be cut down by others which show the testator to have had a different intention. Thus, "heirs male of the body" have been construed to be words of purchase, where it was clear that such was the intention of the testator; *Lisle v. Gray* (a), *Lowe v. Davies* (b), *Bagshawe v. Spencer* (c), *Goodtitle d. Sweet v. Herring* (d). In the present instance the testator has sufficiently explained his meaning, for the whole of the latter part of the clause shows that by the use of the words "heirs male," in the devise in question, he merely meant to designate certain individuals. These were the sons of William Fetherston, to whom he has given the estate to take by purchase after the expiration of their father's life estate. The case between Baldwin and Smith, reported as Archer's case (e), was a stronger case than the present, for there, though the testator devised to "Robert Archer, my first son," for life, yet he afterwards declared that the said "messuages and tenements shall wholly remain to the right and next heir of the same Robert Archer, and to the heirs of his body for ever." Yet in that case it was agreed that Robert had not an estate for life. The words in the present will, "according to their seniority in age, and their respectively attaining the age of 21 years," and "the elder son and the heirs male of his body always to be preferred to the second or younger sons," show that the preceding words "heirs male" must be read "sons," who are thus individually pointed out to take the estate, and who, therefore, take as purchasers and not by descent. The words of limitation applicable to an estate of inhe-

(a) 2 Lev. 223.

(b) 2 Ld. Raym. 1561.

(c) 1 Ves. 142.

(d) 1 East. 264.

(e) 1 Rep. 63 and 66.

ritance are only employed with respect to the devise to the sons. That shows that the intention of the testator is clear, and that intention may be easily effectuated. The difficulty as to sacrificing a particular intent in in order to fulfil a general intent does not exist here. There is, in fact, no distinction between them in the present case. Both point alike to the devisee William Fetherston, as being the devisee of an estate for life. The words used by the testator with regard to the sons of William Fetherston leave no doubt as to his intention. In one single instance only does he use the expression "heirs," in all the rest he employs the words "son" and sons;" and this fact proves, beyond a doubt, that he intended the estate of inheritance to begin with the vesting in possession of the sons. The word "sons" in one part of a devise has been held sufficient to cut down the effect of the word "heirs," or "issue," in another part; *Long v. Laming* (f), *Blackburn v. Hewer Edgely* (g), *Goodtitle d. Sweet v. Herring*, also proceeded expressly on this principle. The manifest intention of the testator, not the mere use of a particular technical word, must govern the construction of the instrument.

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Sir *W. Follett* and Mr. *Cruise* for the Defendant in Error:—The devise to W. Fetherston was not a devise for life but in tail. The words "William Fetherston and his heirs male," at once passed an estate of inheritance. The law favours estates of inheritance (h); and, therefore, where an estate tail has been created by words proper for that purpose, the Court will not cut it down to an estate for life by any subsequent

(f) 2 Burr. 1100.

(g) 1 P. Wms. 600.

(h) Burton on Real Prop., 3d edit. pl. 656.

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expressions, unless those expressions are of a very decided character and clear meaning, and leave no doubt as to the intention of the testator. If the two sets of words are equally strong, and the context of the will does not distinctly require that the estate of inheritance should be cut down to a life estate, the Court will uphold the former (*i*); *Jesson v. Wright* (*k*), and *Jones v. Morgan* (*l*). In the latter case the authority of *Bagshawe v. Spencer* was much questioned. There is nothing whatever in the present will showing the intention of the testator to have been to create merely an estate for life in William Fetherston. Every indication of his intention is the other way. It may be admitted, that in some cases, the Courts have allowed the use of the words "son" and "sons" to explain away the legal meaning of the word "heirs," but all these have been cases where the intention of the testator would plainly have been defeated by any other construction. *Doe d. Long v. Laming* was an instance of that sort. Here, on the contrary, his intention would have been defeated by such a construction: nor is there anything in the context of the will to warrant it. The latter parts of the devise are only intended to describe and identify the heirs of William Fetherston, not to make them take as purchasers an estate given to their father as an estate of inheritance. This case must be governed by the principle stated in the certificate sent by the Judges of the Court of Common Pleas in the case of *Poole v. Poole* (*m*), that where there is not a sufficient indication of the testator's intention to restrain the legal effect of the words "heirs male," and to con-

(*i*) *Fearne*, Cont. Rem. 148.

(*k*) 2 *Bligh*, 2.

(*l*) 1 Bro. Chan. Cas. 206.

(*m*) 3 Bos. & Pul. 629.

vert them into words of purchase, they shall pass an estate tail. There is no such indication of intention here.

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At the close of the argument Lord *Brougham* framed a question for the Judges who took time to consider it.

Lord Chief Justice *Tindal* on the following day delivered the opinion of the Judges: My Lords, the question proposed by your Lordships for the consideration of His Majesty's Judges, is this—"Whether, under the devise contained in the will set forth in the special verdict given in this case, the devisee, William Fetherston, took an estate in tail or an estate for life only?" And upon this question the Judges who have heard the argument at your Lordships' bar, are unanimously of opinion that William Fetherston took an estate in tail. 14th April.

The first words of the deviser, namely, "I give to my kinsman William Fetherston and his heirs male, my real estate," are words which by a well-known rule of law do in a will give to the devisee a clear and unequivocal estate in tail. The only question, therefore, is whether the words which follow, do with so much clearness and certainty control those which have preceded them as to denote that it was the intention of the testator to cut down the estate tail in the first taker into an estate for life, and to make his first and other sons tenants in tail by purchase. Now we think the rule of construction laid down by Lord *Alvanley* in his judgment in the case of *Poole v. Poole* (n), being at once the result of the former cases,

(n) 3 Bos. & Pul. 627.

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and being consistent with the principles of legal construction and of good sense, is the safe and correct rule to be applied to cases of this description, namely, "That the first taker shall be held to take an estate tail where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Applying that rule to the present case, we do by no means think the subsequent words of the devise shew a plain and unequivocal intention in the testator to reduce the estate tail in William Fetherston to an estate for life; on the contrary, we think them at least as compatible with an explanation of what the testator supposed to be the course of descent under an estate tail; for if William Fetherston takes in tail then "his heirs male" would take "according to their seniority in age," as the devisee expresses it; and again, the eldest son if he survived, and "the heirs male of his body, lawfully begotten," would always be preferred to the second or younger son;" and again, the clause which provides what shall happen if there shall be a general failure of issue of William, before the estate goes over to Theobald, is directly consistent with an estate tail in William.

The words in the devise, which appear to denote some intention in the testator that "the heirs male shall take on their attaining the age of 21 years," cannot be urged as an argument against the estate in William being held to be an estate tail, first, because those words would create the same difficulty against the holding the estate given to the sons of William to be an estate tail, which on all hands is allowed to be the case if William has not the estate tail in himself, and secondly, because if the devise in other

respects is a devise in tail, the testator cannot by interposing such a condition (if indeed it is to be held to be a condition in this will) create a new estate or a new course of descent not known to the law. Without professing to explain all that the testator may have intended by the words he has used, we hold that William Fetherston takes an estate tail under this will upon this broad ground, that an estate tail is given by the devise to him and his heirs male, and that such estate is not taken from him or reduced to an estate for life by any words that follow, denoting such intention of the testator with sufficient certainty and clearness.

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Lord *Brougham*:—My Lords, agreeing entirely with the opinion of the learned judges in this case, it is perhaps hardly necessary for me to state the reasons upon which I have arrived with them at the conclusion that the words of this devise give an estate tail, and not an estate for life, to William Fetherston, the first taker. But as the practice here of late has been adopted of assigning the reasons of judgments pronounced in your Lordships' House upon questions touching materially the principles of law which are brought by appeal from the other parts of the United Kingdom, I conceive it advisable that I should not deviate from that practice in this instance, where the Writ of Error is brought from Ireland.

I take the principle of construction as consonant to reason, and established by authority, to be this, that where by plain words, in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered and cut down to a life estate unless there are other words which plainly show the testator to have used the former as words of purchase,



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contrary to their natural and ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate tail being given by the words in question, and which general intent can only be fulfilled by sacrificing the particular provisions, and regarding the expressions as words of purchase. Thus, if there is a gift first to A. and the heirs of his body, and then in continuation, the testator, referring to what he had said, plainly tells us that he used the words "heirs of the body" to denote A.'s first and other sons, then clearly the first taker would only take a life estate. It is needless to add, that there is a variety of ways in which such a reference and explanation may be given. A testator may, as in one case, after speaking of "heirs of the body" or "heirs male," which in a will are equivalent to the former expression, proceed referring to what he had before said, and speak of such first and other sons; or, as in another case, he may specify "my sons successively as aforesaid, or as abovementioned," or he may say, "from and after the death of those several sons who are to take one after another." So again, if a limitation is made afterwards, and is clearly the main object of the will,—which never can take effect unless an estate for life be given instead of an estate tail,—here again the first words become qualified, and bend to the general intent of the testator, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been.

There have been at different times decisions on this point, some of which, as *Doe v. Goff*(*o*) are now entirely displaced, and others, as *Doe v. Jesson*(*p*), are directly overruled by reversal in this House(*q*). Even *Doe v. Laming*, where the circumstance relied on was the

(*o*) 11 East, 668.

(*p*) 5 M. & S. 95.

(*q*) 2 Bligh, 2.

impossibility of devisees taking gavelkind lands as tenants in common, has been considerably shaken by its remarkable inconsistency with the purport of some other cases; and as far as regards the peculiar circumstances adverted to by Lord Mansfield of the land being gavelkind, it has been expressly displaced by the late case of *Doe d. Bagnall v. Harvey* (*r*). All we need therefore say upon this second head of exception to the expressions being taken as words of limitation, is that it may be rendered necessary as well by the general frame of the will to consider those words as words of purchase, as by the explanation subsequently given by the testator that he used them in that sense. Such indeed is the force of those words—such their clear tendency to give an estate tail, that we may almost lay it down as a rule that no other provision of a will is sufficiently strong to overrule this tendency and make them words of purchase, which does not fall within the first head of exception, and show that the testator's meaning was other than what at first sight it appears to be.

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We have now, therefore, to examine whether any explanation is, in the present case, given by the testator, which shows that he intended that Cuthbert Fetherston should only take as a purchaser.

It is, first of all, quite clear that a gift to William Fetherston and his heirs male is, in a will, an estate tail, and the addition of "according to their seniority in age," makes no kind of difference, for it is implied in "heirs male," and by no means converts that devise into a devise to sons. This was explicitly decided in *Jones v. Morgan* (*s*), where the words were "severally, respectively, and in remainder, the one after

(*r*) 4 Barn. & Cress. 610. and Lord Tenterden's judgment, 620.

(*s*) 1 Bro. C. C. 218.

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the other, as they and every of them shall be in seniority of age and priority of birth,"—words more expressive than any used in this case. The qualification of attaining 21 years of age, though it may give rise to some difficulties as to the administration of the estate, is not, in my opinion, of a nature to alter the preceding words or make them words of limitation. Indeed the difficulty which they interpose, appears to press nearly as much on the one construction as on the other. But then follow the words on which reliance is mainly placed by the Plaintiff in Error, "the elder son surviving of William Fetherston and the heirs male of his body always to be preferred to the second or younger sons," and it is contended that they, by explaining what "heirs male of William Fetherston" meant in the preceding part of the gift, converted those into words of purchase. I am very clearly of opinion that the clause has no such effect; and, after remarking that it is connected with the former part by not a single word of reference, I shall advert to the cases which are said to bear out the construction of the Plaintiff in Error.

Of *Archer's* case (*t*) it is unnecessary to say much. There the gift was to A. for life, and to the next heir male of his body, and the heirs of the body of such next heir male, and was held to be purchase in the next heir male, both because if he were to take by limitation you must reject the limitation in tail upon that limitation, and also because you must reject "next," a very important word, preceding the words heir male, and one which shows a different intention in one part of the devise from that prevailing in the other. That case clearly does not bear upon the

(*t*) 1 Rep. 63 and 66.

present. Then *Lisle v. Gray* (u) is relied upon. The devise there was to the first son of A. and the heirs male of his body, and for default of such issue to the second son, and then to the third and fourth sons, all by the name of sons, and the heirs male of their bodies; then come these words: "and so on to all and every other the heirs male of the body of A. respectively and successively, and the heirs male of their bodies." The ground of the decision in that case was, that the connecting words, "and so on," clearly showed the sense in which the words "heirs male," that followed, were used, the testator having thus connected those words with sons, repeated four times over, and having in the first instance given the estate to the sons by the description of sons. Surely that case cannot be likened to the present, where, without any word of reference, all we have is the expression, "the elder son surviving to take before the younger." It may, however, be added, that *Lisle v. Gray* never was finally decided, for the cause was dropped during the pendency of a Writ of Error, and the reporter expresses some doubt how it might have gone ultimately.

As for *Lowe v. Davies* (x), it really proves less than nothing. There it was a devise to A. and his heirs, lawfully to be begotten, that is to say, his first, second, third and every other son and sons successively to be begotten of the body of A. and the heirs of the body of such first, second and third sons. Can we doubt that the word "heirs," first used, was explained by what followed, the explanatory words being "that is to say, first and other sons"? No words can be conceived more plainly explanatory of the sense in

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(u) 2 Lev. 223.

(x) 2 Lord Raym. 1561.

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which "heirs of A." had been employed. A. there clearly took only an estate for life, notwithstanding the inaccurate use of the word heirs, an inaccuracy hardly used before it is corrected by the most technical expression of words of purchase. *Poole v. Poole* (y). is a case clearly with the Defendant in Error. The demise there was to A.'s first son for life, remainder to trustees to preserve contingent remainders, remainder to the heirs male of such first son, so as the elder of such sons, and the heirs male of his body, shall always be preferred, and take before the younger and his heirs male; remainder to the second, third and fourth sons; remainder to the several heirs male of their several and respective bodies, so as the elder shall always be preferred to take before the younger of such sons. The word "such" clearly shows sons to mean heirs male, and was held so to do, and not to show the converse, that heirs male meant sons; and Lord *Alvanley*, in addition to the words just cited by the learned Lord Chief Justice, said, in delivering the opinion of the Judges, that, in his judgment, "words are always to be taken in their ordinary sense, unless the testator has demonstrated an intention to put a different sense upon them." Lord *Alvanley* also added, "now the words employed in the first devise are clearly, in their ordinary sense, words of limitation," and all that follows is to the same purpose, and he concluded his elaborate and luminous judgment by saying, that "the Court would not be justified in suffering the rule of law to be broken in upon, where it could not see a plain intention to vary the construction which the law puts upon the words "heirs male of the body(z)." As to *Goodtitle*

(1) 3 Bos. & Pul. 610.

(2) 1b. pp. 627-29.

v. *Herring* (a), that was a case of distinct explanation and plain reference, for it was a devise to heirs male of the body of A. successively, the eldest of such sons and the heirs male of his body being always preferred to the younger son or sons. That case was exactly the same with *Lowe v. Davies*, on which I have already remarked.

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It appears to me, my Lords, quite manifest that none of those cases gives any warrant for holding the words added in this case to the gift of an estate tail to be sufficient to cut down that estate to an estate for life, and I have no doubt at all that the earlier words of limitation are to be taken as such, and as standing unaffected by those which follow: I have no hesitation, therefore, in moving your Lordships that the judgment be affirmed with costs.

Judgment affirmed with costs.

(a) 1 East, 264.

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April 6.

## A P P E A L

FROM THE COURT OF CHANCERY IN IRELAND.

HENRY SEYMOUR MOORE VANDELEUR,  
Esq., ANNE FRANCES VANDELEUR,  
Spinster, and ALICE STEWART, other-  
wise VANDELEUR, Widow, the younger  
children of the Right Hon. JOHN  
ORMSBY VANDELEUR, deceased - ) *Appellants.*

CROFTON MOORE VANDELEUR, Esq.)  
the eldest son of said JOHN ORMSBY  
VANDELEUR, and the Right Hon.  
THOMAS BURTON VANDELEUR, one  
of the Judges of His Majesty's Court  
of King's Bench in Ireland, and  
CROFTON FITZ GERALD, Esq., Exe-  
cutors of the last will and testament  
of the said JOHN ORMSBY VANDE-  
LEUR - - - - - ) *Respondents.*

*Marriage  
Settlements.  
Personal and  
Real Estate.  
Exemption  
from Debts.*

A deed of settlement was made in contemplation of marriage, and contained a proviso by which the estates, &c. thereby granted, should in the first place be charged with certain portions therein mentioned, due to the brothers and sisters of the settlor, and with certain debts set forth in a schedule thereunto annexed. The covenant against incumbrances specially excepted a jointure to the settlor's mother, and the before-mentioned portions and debts, and the covenant for further assurance contained an exception similar to the foregoing by an express reference to it. The settlor was possessed of other estates besides those settled. The settlor after his marriage paid off some of the portions and some of the debts, and, by his will, declared such payments to be in ease of his settled estate. Held, by the House of Lords, reversing a decree of the Court of Chancery in Ireland, that

all rights must be taken to be as they were established at the date of the conveyance, and therefore neither any directions in the will of the settlor, nor the state of his affairs at his decease, could alter its construction; and consequently that the debts, &c. continued to stand as a burthen on the real estates, and that the personal estates were exonerated in the hands of the executors.

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IN the year 1800, a marriage was intended to be solemnized between John Ormsby Vandeleur and Lady Frances Moore, the youngest daughter of the Marquis of Drogheda. The marriage portion of the lady was a sum of 6000*l*. By an indenture of release, bearing date the 17th day of November 1800, and made between the said John Ormsby Vandeleur (since deceased) of the first part, the most Noble Charles Marquis of Drogheda, and the said Lady Frances Moore of the second part, Richard Earl of Shannon and the Honourable Francis Nathaniel Burton of the third part, and William Burton and Thomas Burton Vandeleur, Esqrs., of the fourth part, and which indenture was expressed to be made in consideration of the marriage and of the marriage portion, certain hereditaments in the counties of Limerick and Clare, of which the said John Ormsby Vandeleur was seised in fee, were conveyed and assured by him, from and after the marriage, to the use of himself for life, with remainder to trustees to preserve contingent remainders; and after his decease, to the use of the said William Burton and Thomas Burton Vandeleur for the term of 99 years, to secure a jointure for his said intended wife; and subject thereto to the use of the trustees for five hundred years for raising the sum of 10,000 *l*. as portions for the younger children of the marriage; and subject thereto to the use of the first and other sons severally and successively accord-



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ing to their respective priorities in tail male, and in default of such issue, to the use of the settlor in fee.

After the limitations before stated, and the declarations of the trusts of the two terms of 99 years and 500 years, and immediately following the proviso for cesser of the latter term, the settlement contained the following declaration :

“ Provided always and it is hereby declared and agreed by and between the parties to these presents, that all and every of the said towns, lands, tenements, hereditaments, and premises hereby granted and conveyed, shall in the first place stand and be charged and chargeable, and the same are hereby declared to be charged with the several sums due for the portions of the brothers and sisters of the said John Ormsby Vandeleur, amounting to the sum of 15,900 *l.*, and also with the judgments and bonds hereinafter mentioned, and which several sums are particularly set forth in a schedule hereunto annexed, and amount to the sum of 12,700 *l.*”

Then followed a power for the settlor to jointure future wives ; and the power of leasing : and then the covenants for title ; and the covenant against incumbrances was expressed as follows : “ And that free and clear, or freely and clearly acquitted, exonerated, and discharged or otherwise, by the said John Ormsby Vandeleur, his heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified of from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, jointures, dowers, right and title of dower, portions, uses, trusts, wills, entails, statutes, recognizances, judgments, extents, executions, and of and from all and singular other estates, titles, troubles, charges, and incumbrances whatsoever had, made,

done, committed, or suffered by him the said John Ormsby Vandeleur, or by any of his ancestors, or by any person or persons claiming or to claim from by or under them, or any of them, or under their or any of their acts, means, assent, consent, or procurement other than and except the jointure of 700*l.* yearly, provided for Alice Vandeleur, widow, mother of the said John Ormsby Vandeleur, during her life, and other than and except the several sums due by judgment or bonds to the different persons in the schedule hereunto annexed, amounting in the whole to the sum of 12,700 *l.*, and also other than and except the sum of 15,900*l.*, the portions due to the brothers and sisters of the said John Ormsby Vandeleur, with all and every of which said several sums the said lands and premises are hereby charged, and other than and except the quit rents issuing and payable out of the said lands and premises, and other than and except such leases of the said lands and premises as have been heretofore really and *bonâ fide* made to the tenants thereof." And the covenant for further assurance made a similar exception by this reference to the foregoing, "except as before excepted."

Some of the debts enumerated in the schedule annexed to the said settlement, were debts previously contracted by the settlor, and to which he was personally liable. The rest were debts contracted by his father and predecessor in estate, Crofton Vandeleur. The 15,900 *l.* for portions had been charged on the estates by the marriage settlement and will of his father, Crofton Vandeleur.

The settlor being also seised in fee of the lands of Moyne and Ballymote (exclusively of the settled estates), and being also possessed of a large personal estate, made his will, dated 7th of August 1828, and

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thereby, after sundry bequests to his wife and daughters, devised the lands of Moyne and Ballymote to T. B. Vandeleur and Crofton Fitz Gerald, their heirs, &c., in trust, to receive and take the rents and profits until his eldest son, Crofton Moore Vandeleur, should attain the age of 27 years, to be applied as thereafter directed, and subject thereto to the use of his said son for life, with several remainders over; these rents to be invested from time to time in government funds, and the dividends payable thereon, to accumulate until his said son should attain the age of 27 years, or if he should die before attaining that age, until such time as he would have attained that age in case he had lived, and testator directed such rents and profits, and all accumulations thereof, to form part of his residuary estate, to be disposed of as thereafter directed. And testator directed (among other things) that a certain judgment entered on one Andrew Browne's bond (one of the bond debts of the testator mentioned in the schedule) should be satisfied by his executors, the same having been paid. And as to all the rest of his property, of what nature or kind soever, (except his books, pictures, and plate,) he left same to T. B. Vandeleur and Crofton Fitz Gerald in trust for his younger child or children, his or their heirs, executors, and administrators, as to so much thereof as with the sum he, she, or they should be entitled to under his (said testator's) marriage settlement would make up the sum of 10,000 *l.* for each and every of his said children, such children, if more than one, to take as tenants in common, and not as joint tenants; and as to the residue thereof in trust to pay the interest or annual produce to his the said testator's wife during her life, and after her decease, in trust for his said younger

child or children, his, her, or their executors and administrators, in equal shares, if more than one, and as tenants in common. And the said testator appointed the Respondents T. B. Vandeleur and Crofton Fitz Gerald executors of his said will, and the said Respondent T. B. Vandeleur, guardian of his children until they should respectively attain the age of 21 years.

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The testator died on the 9th of November, 1828, leaving Lady Frances Vandeleur, his widow, and four children, viz., the Respondent Crofton Moore Vandeleur, the Appellant Henry Seymour Moore Vandeleur, his only other son, and two daughters, viz., the Appellants Anne Frances Vandeleur and Alice Stewart, widow. During his lifetime he paid off part of the sum of 15,900 *l.* to his brothers and sisters, and also some of his father's debts, and some of his own debts contained in the said schedule, and declared such payments to be in ease of his said settled estate.

In January 1831, a bill was filed by the Respondents T. B. Vandeleur and Crofton Fitz Gerald, the executors, against the Respondent Crofton Moore Vandeleur, and the Appellants and Lady Frances Vandeleur (since deceased), stating, amongst other things, that the testator's widow and younger children insisted that the debts or sums paid off by the said testator during his life, he being tenant for life only of the lands charged, should still be considered as subsisting charges, and should form part of the testator's personal estate, but that the Respondent Crofton Moore Vandeleur, on the contrary, insisted that such payments were made in exoneration of the estates; and as to such of the scheduled debts as were the testator's own, and remaining unpaid at his death, that his personal estate was the primary fund liable to payment of

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them. And the bill prayed that the rights of the several parties to the personal estate of the said testator might be declared, and the trusts of the testator's said will as to his personal estate might be carried into effect.

Answers were duly put in, and evidence gone into on both sides. The cause was heard on the 12th of May 1832, before the Lord High Chancellor of Ireland, and by the decree of that date it was referred to one of the masters, to enquire and report the debts specified in the schedule annexed to the settlement, and to report whether any, and which of them, had been paid, by whom all such debts respectively were contracted, whether judgments had been entered on any and which of the said debts, and if so, whether any, and which of the judgments had been satisfied or directed so to be, and all particulars relating to such debts.

The master made his report pursuant to the said decree, bearing date the 22d of June 1832, and set out a list of the debts, which comprised, amongst others, the following items, viz.: No. 1. Bond and Warrant of John Ormsby Vandeleur to Mrs. Dorothea Burton, dated 9th of January 1796, in the penalty of 2,400 *l.* conditioned for the payment of 1,200 *l.*

No. 6. Bond of John Ormsby Vandeleur to Mr. John Daxon in the penalty of 6,800 *l.* conditioned for the payment of 3,400 *l.*

No. 8. Bond of same to the Rev. Mr. Whitty, in the penalty of 1,000 *l.*, conditioned for the payment of 500 *l.*

And the said master found that these three debts still remained unpaid, and that the sum of 1,200 *l.*, and the sum of 3,400 *l.*, and the sum of 500 *l.*, were all debts contracted by John Ormsby Vandeleur; that on the first no judgment had been entered up, but

that on the two last judgments had regularly been entered up, which judgments were then outstanding.

No exceptions were taken to the report, and it was duly confirmed. The cause was heard on further directions before the Lord Chancellor on several days, and on the 25th of May 1833, his Lordship, by an order of that date, declared that as to such of the debts and charges in the schedule to the settlement of 1800 as were paid off by the said testator in his lifetime, the same were not subsisting charges on the settled estates, but that the same were paid off in ease of such estates: and his lordship further ordered and declared, that as to the sums of 1,200 *l.*, 3,400 *l.*, and 500 *l.* in the said list or schedule to the said master's report mentioned and found to have been debts contracted by John Ormsby Vandeleur, and to be still due and unpaid, the personal estate of John Ormsby Vandeleur was the primary fund for the payment of the same, and the plaintiffs admitting assets in their hands sufficient, after the payment of the other debts, funeral expenses, and express pecuniary legacies bequeathed by the will of John Ormsby Vandeleur, it was ordered that the plaintiffs, (the Respondents T. B. Vandeleur and Crofton Fitz Gerald,) out of the surplus of the said personal estate of the said John Ormsby Vandeleur, should pay the same, and it was further ordered that the plaintiffs should be paid their costs in said cause out of the personal estate of the said John Ormsby Vandeleur, and that the several defendants should abide their own costs. This was the order now appealed from.

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Mr. *Pemberton* and Mr. *Knight* for the Appellants :  
—It is clear that the real estate is not exonerated from the payment of these debts. If there had been an actual incumbrance on the estates when the settle-

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ment was made, the effect of it would have been to make the estate settled the primary fund out of which the incumbrance must be paid. That is in principle the same as the present case. Is there any distinction between such words in a settlement and in a will? There is. In a will, the words of a testator, indicating his own intention, govern every thing. A settlement is to be construed like any other contract. The Respondent here, Crofton Vandeleur, claims as a purchaser. What has he bought? In answering that question, it is important to bear in mind the distinction between a deed of settlement and a will. If this estate had been sold subject to an incumbrance upon it, he would have been liable to pay the incumbrance. Why? Because he could only take what he had paid for.—[Lord *Plunkett*: The difference between the case of a will and that of a deed is, that one is a contract and the other is not.]—And the present is clearly a case of contract, for the consideration is marriage and a sum of money, and the estates are taken subject to the burdens already existing on them. This case is the same in principle as that of *Noel v. Noel*.<sup>(a)</sup> The debts here were not such as could ever have been properly charged on the personal estate. In that case Lord *Redesdale*, adverting to a similar circumstance, said: <sup>(b)</sup> “ Looking at the original constitution of the debt itself, I think a great doubt might be raised whether it ever was a debt upon the personal estate, I mean a debt which any person but a creditor had a right to demand as against the personal estate; for a creditor may have a right to demand a debt against the personal estate, which the heir at law or devisee of the real estate may not have a right to require to be paid out of the personal estate in exoneration of the real estate. Thus,

<sup>(a)</sup> 12 Price, 214.

<sup>(b)</sup> *Ib.* p. 303.

for instance, if a real estate comes to a man subject to a mortgage, and upon transfer of that mortgage that person covenants for the payment of the mortgage money, (which he must do in order to obtain the loan from the person who takes the mortgage,) that is not a debt which is to be paid out of his personal estate, in exoneration of his real estate, for the benefit of the heir at law, because the debt was not originally his debt." The principle of that case must govern the present. The language of the settlement here is even stronger than in that case. The terms of the proviso are too strong to admit of doubt; they make the estates directly chargeable with the portions for the settlor's brothers and sisters, and with the debts stated in the schedule. The covenant for further assurance contains expressions equally strong. This direct charge on the real estate is a clear exoneration of the personalty. Yet the decision of the court below has destroyed the charge thus directly fixed on the real estate, and has fixed it on the personal estate, which was not before liable. That decision is not maintainable.

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Mr. *Jacob* and Mr. *Parry* for the Respondents:—  
 The terms of this settlement are not so expressed as to exonerate the personal estate. It is doubtful whether such was the intention of the settlor at the time of making the settlement, and it is clear that such was not his intention at the time of making his will. The evidence shows that the testator had paid off several of the debts mentioned in the schedule with the view of relieving the estate of his eldest son. The argument on the other side supposes that this settlement was to operate as a contract of indemnity to the personal estate. It has no such operation. The very terms of the settlement show that such was not the intention of the parties. There is no power given to



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trustees to raise funds for the payment of the debts of the settlor. There would have been such a power if the real estate was meant to be charged with those debts. The covenant against incumbrances does not bind the estate for the purpose supposed; it was necessary at the time, because it was intended that these incumbrances should be at once paid off. Suppose the testator had been insolvent, can it be said that the bond creditors could have claimed against the settled estates? Certainly they could not, for the charges on those estates were not created for the benefit of the creditors. The case of *Noel v. Noel* is essentially different from the present. That was a case arising merely on the equity of redemption, and no trustees were required there, for the mortgagees had their own remedy in their own hands. [Lord *Plunkett*: Lord *Redesdale* in that case seemed to think that a purchaser for money, and a person coming in under a marriage settlement, stood in the same situation.

Lord *Brougham* asked the Appellants' counsel, how they proposed that the estates should be charged in exoneration of the personal property.

Mr. *Pemberton* answered, that he should ask for the real estate to be made liable for whatever the personal estate had paid to creditors under the decree exonerating the real estate, which was the first charged by the settlement.

The Counsel for the Respondents continued:—In the case of *Duke of Ancaster v. Mayer* (c), Lord Commissioner *Ashurst*, in delivering the opinion of the Court, referred to *Walker v. Jackson* (d), where Lord *Hardwicke* said, the general rule is, that the

(c) 1 *Brown's Chan. Cas.* 454.

(d) 2 *Atk.* 624.

personal estate shall be first applied ; and the Lord Commissioner added, “unless there are express words or a plain intent to the contrary.” The case afterwards came before Lord Chancellor *Thurlow*, when his lordship said, “it would be highly advantageous to property, if there was a settled rule where the personalty should be applied to the payment of debts, and where it should be exempted from them. One step had been taken towards such a rule by its being laid down, that charging the real estate in any way, is not of itself an exemption of the personal estate ; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be in the first place applied. I have always understood that in order to exempt the personal estate, the testator must express an intention so to do, I therefore take the rule to be, that neither the charge of the debts upon the real estate, nor the gift of the personal is sufficient of itself to exempt it.” In *Tait v. Lord Northwick* (e), it was held, that the personal estate is the natural fund for the debts, and can only be exempted by the intention to exempt it, expressed in the will ; a charge upon real estate, however anxiously created, is not of itself sufficient. In *Serle v. St. Eloy* (f), this rule was carried still further. There a testator devised his lands in D. to an infant at her age of 21, subject to the incumbrances thereupon, and the rents during the infancy to be paid to her father, and devised all his other lands to trustees to pay his debts ; the lands in D. being mortgaged, it was held, that the mortgage should be discharged by the monies arising from the sale of the other lands.

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(e) 4 Ves. 816.

(f) 2 P. Wms. 386. S. C. 2 Eq. Cas. Ab. 375.

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Mr. *Pemberton* in reply :—There is not one of the cases cited on the other side which can govern the present. The case of *Serle v. St. Eloy* never met with the approbation of the profession—[Lord *Brougham* : Mr. Cox, in his edition of Peere Williams, says (g), that that case was affirmed upon appeal, but he mentions it as one that was not always approved of (h).]—In that and the other cases, the question arose upon wills, and the distinction between wills and deeds of settlement has already been pointed out. The subsequent declarations of the testator cannot affect the construction of the settlement. The case of the Duke of *Ancaster v. Mayer* does not apply to the present ; the circumstances are totally different ; and the present case must be governed entirely by the case of *Noel v. Noel*, in which the principle acted upon was, that a settlement makes the real estate primarily liable for those debts charged as in this manner upon it.

Lord *Brougham* :—The case of *Noel v. Noel* is certainly one of considerable importance, and its application to the present deserves to be fully considered.

Lord *Plunkett* :—At the time I made the order now appealed from, I felt considerable difficulty upon the subject. After a careful examination of the case, I pronounced the decree, but I felt doubtful whether it was right or not, I therefore desired that there

(g) 2 P. Wms. 386 n.

(h) The Attorney-General, in arguing the case of *Tweedale v. Coventry*, says, (1 Bro. Chan. Cas. 252) that the case of *Serle v. St. Eloy* is not accurately reported, “ that subsequent to the devise of the estate subject to the incumbrances upon it, the devise of other lands was to pay *all* his debts, though the word *all* is omitted in the report.”

should be a further examination into the case. *Noel v. Noel* was mainly relied on, in the argument in the Court below, and I felt it to be a serious thing to come to a conclusion opposite to that of Lords *Eldon* and *Redesdale*; but still that case did not appear quite to govern the present.

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Judgment postponed (i).

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Lord *Brougham*:—My Lords, there was a case of *Vandeleur v. Vandeleur*, which stood over for judgment on appeal against an order of the Lord Chancellor of Ireland. The case was this: John Ormsby Vandeleur being seised in fee simple of estates in the counties of Limerick and Clare, on his marriage, in 1800, with the Lady Frances Moore, in consideration of that marriage, and of 6,000 *l.*, her portion, conveyed those estates to trustees in trust for himself for life, and after his decease for two terms to raise younger children's portions, and to secure a jointure for his widow, remainder in strict settlement for the first and other sons of the marriage, with remainder to the settlor in fee. A proviso is expressly added to the following effect:

May 25.

“ Provided always, and it is hereby declared and agreed, by and between the parties to these presents, that all and every of the said towns, lands, tenements, hereditaments, and premises, hereby granted and conveyed, shall in the first place stand and be charged

(i) See very learned notes by Mr. Cox on this subject, introduced in the cases of *Howel v. Price*, 1 P. Wms. 294, and *Evelyn v. Evelyn*, 2 P. Wms. 664; and see also a recent case where it was held that an intention to exempt personal estate need not be so manifested that every person must admit it; it is quite sufficient if it be so expressed as to convince the Judge who has to adjudicate upon it. *Booth v. Blundell*, 1 Meriv. 193. 210.

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and chargeable, and the same are hereby declared to be charged with the several sums due for the portions of the brothers and sisters of the said John Ormsby Vandeleur, amounting to the sum of 15,900*l.*, and also with the judgments and bonds hereinafter mentioned, and which several sums are particularly set forth in a schedule hereunto annexed, and amount to the sum of 12,700*l.*"

A covenant follows against incumbrances with the exception of "the several sums due by judgment or bond to the different persons in the schedule hereunto annexed, amounting in the whole to the sum of 12,700*l.* : And also other than and except the sum of 15,900*l.*, the portions due to the brothers and sisters of the said John Ormsby Vandeleur, with all and every of which said several sums the said lands are hereby charged."

There is also a covenant for further assurance, but with the like exception. It runs, "except as before excepted," referring to the exception in the preceding covenant. What the settlor may have done afterwards signifies not. Nevertheless he showed that he consented ; he had burthened his settled estates with the debts, for on paying off part of the portions, 15,900*l.*, of his brothers and sisters, and also part of the debts in the schedule, 12,700*l.*, he declared such payments to be in ease of the settled estates. It is further to be observed, that part of the debts in the schedule, and part of those paid off, were contracted by the settlor's father, and part were his own debts.

A bill having been filed by the executors of J. O. Vandeleur against his eldest son and the younger children and the widow, to have the rights of the parties declared, the trusts of the will carried into effect, and the necessary accounts taken, and an answer having been put in by the defendants, it was referred

to the master to ascertain what debts, in the schedule comprised, remained unpaid, and by whom these were contracted. The master reported that there were three bonds unpaid, one for 1,200*l.*, one for 3,400*l.*, and one for 500*l.*, in all of which J. O. Vandeleur was the obligor; the two last only being secured by judgments, the first by a warrant on which no judgment had been entered up. This report being confirmed, the question, which alone was agitated between the parties below, and is in contest before your Lordships, came before the Lord Chancellor of Ireland for his decision, namely, whether the estates which the eldest son, Crofton Moore Vandeleur, took under the settlement, were so charged with the debts in the schedule reported still due to the amount of 5,100*l.* that they fell upon him, or whether these debts were a charge on the personal estate, to be borne by that estate alone in exoneration of the realty. His Lordship held that the personalty being the fund primarily liable, must exonerate the real estate, and that the surplus of the personal estate should be so applied after payment of other debts not in the schedule, funeral expenses and express pecuniary legacies. His Lordship did not allow any parties the costs except the plaintiffs, the executors, who were to be paid out of the personal estate.

This decree is brought here by appeal, the noble and learned Lord who made it having expressed considerable doubts respecting the question, and having recommended that the opinion of this house should be taken upon it.

I am of opinion that the decree is erroneous, and ought to be reversed, except as regards the costs of the suit below.

As between volunteers there can be no doubt

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whatever of the rule. The personal estate is primarily liable, and must relieve the real, on which debts are charged, unless they have been charged on that realty exclusively in exoneration of the personalty. This exclusive charge may be either in express terms or by manifest intention, gathered from construction, the intention of the testator being the sole rule; and even if the parties here were to be considered as equally volunteers, we should be entitled to examine the instrument in question, with the view of ascertaining whether or not the personalty was intended to be exonerated. Hence, this case may be regarded in two lights: first, as if the question lay between volunteers, and next, upon the ground of the holder of the estates being a purchaser under the settlement.

First: If we had the case of volunteers to consider, the question would turn upon the intention of the settlor to relieve the personal estate, and charge the real estate exclusively. Has he shown such an intention in this case? The words are strong. The estates are declared to be in the first place charged with the debts which were set forth in a schedule for the purpose of specifying to what charge precisely the settled estates are to be subject; what burthen they are to bear. In the covenants too he excepts these same debts. He covenants that for the objects of the settlement the estates are free, discharged, and saved harmless against all debts and charges, except the jointure of his mother, and except the debts scheduled, and he covenants for further assurance, but not against the debts scheduled. It may be observed too, on the principle of *noscitur e sociis*, that the only exceptions besides these debts, are those of the family debts, or brothers' and sisters' portions, and mother's jointure, both of which are unquestionably charged on the real estates,

and on these only, the personalty having nothing to do with them. But for the exception in these covenants for quiet enjoyment and further assurance, the personal estate would have been liable in respect of those incumbrances, as well as in respect of a deficient conveyance. What then is the object of the exception? Plainly to exempt the personal estate from eventual burthen, in the one case, and certain liability, in the other, of and to the debts thus owing. There seems, therefore, some reason to hold that, even regarded as the case of volunteers, the personalty might be held to be exonerated in the peculiar circumstances of this settlement. But the other is the principal ground of my opinion.

Secondly, the tenant last in possession takes under the settlement, and he takes as a purchaser. Suppose Mr. Vandeleur had sold his estate and left it charged with the debts in the hands of the purchaser, it is plain that the purchaser would have been liable, not only to pay the creditors if they had gone against them, but if they had gone against the executors or other personal representatives of the vendor, the purchaser would have been liable to repay whatever was thus obtained. Now how is this different from the present case?

It is said that the purchaser must have been liable, because he would have paid so much less price for an estate so much the less valuable as the charge amounted to. In all probability he would have done so, but it is not of necessary consequence; he might have had the caprice of paying the same price, and still the estate would have been liable in his hands, and at all events this, the diminished price, is an accident and not a circumstance essential to the question, and which can govern its results. The settlor, when he leaves the

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estate charged, means to give so much less, means to put in settlement so much less property. Can we say that this is not considered by him in his settlement? He would answer, "Had I not charged the debts on those two estates, I should only have put the Limerick one in settlement and have left out the Clare one altogether, in which case I might have sold it and paid the debts." But is it quite correct to say that the objects of the settlement do not gain less in the bargain, in consideration of the estate being charged? On the contrary, may it not be considered that if they had been free the Lady Frances Moore's portion would have been more than 600 *l.*, or, that if they had been free, and so the eldest child had been better off, her Ladyship would have been satisfied with a smaller jointure. The whole transaction must be viewed together, and all the provisions are parts of one scheme or plan, or arrangement. But it is quite enough to say, that the amount of what is given on either side, never can enter into an argument in the consideration of a settlement, because the purchasers under it take not as paying any price, but in a wholly different way. They execute then their part of the consideration, as it were through the parties to the marriage contract; the settlor was here one of these, and he expressly gives the estates subject to the debts, and thereby makes the issue of the marriage take only so much as remains after payment of them. No conceivable distinction can, therefore, be taken between such a person and a purchaser under a settlement. The one is as little a volunteer as the other. The simplest and plainest view of this case seems to be this: What did the settlor convey? What did he put into the settlement of real estate? Was it the whole estate, or was it only these estates, after deducting certain debts

in the schedule? That the amount of these remains undetermined till his death, because he might pay part (as he did in point of fact), makes no difference. It only makes the deduction an uncertain sum, the thing deducted a sum uncertain in amount during his life; but the thing in respect of which the deduction was to be made, was quite certain all the while; it was the debts scheduled to such amount as might remain of them unpaid; that is, whatever of these debts scheduled remained such, remained in existence as debts on his, the settlor's, decease. Lastly, it seems impossible to allow this demand on the equities of the parties to be affected, by anything that was done by the settlor after his marriage. All rights must be taken to be as they were established at the date of the conveyance, otherwise a party might alter the rights of others, by things done after the contract was completed. Hence, neither any directions in his will, nor the state of his affairs at his decease, could possibly alter the construction, always of course excepting the circumstance of his paying off the debts, for that is expressly contemplated by the word "debts," on which the whole is grounded by the nature of the charge. And this last observation applies not merely to any arrangement and right to be raised upon the exoneration of the personalty, by express words in the will, in so far as one of the scheduled debts is concerned, and none other; a proviso which plainly never could prove anything, because whatever impression the testator and the settlor might have had on his mind when he made his will, the only question is, what he did convey before by his settlement; but the observation applies also to the whole argument for the view taken on the decree, because that view proceeds upon the principle of the personal estate continuing liable

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at the testator's death, and so exonerating the real assets descended.

The cases of *Noel v. Noel* (a), and *Waring v. Ward* (b), contain matter confirming the view which I have felt it necessary to take of this question, though they do not come up to absolute decisions upon the point.

I have, therefore, humbly to move your Lordships, that the decree appealed from be in part reversed, and that it be declared that the debts in the schedule reported unpaid at the testator's death, be and stand as a burthen on the settled estates, in the counties of Limerick and Clare, and that the personal estate of the testator in the hands of the executors (plaintiffs in the suit below), be exonerated therefrom. In other respects this decree ought to stand, and no parties have any costs except the executors (plaintiffs), who are to have, according to the decree, their costs out of the personal estate, and also they are to have the costs of their appeal out of the same fund.

May 15.

The judgment of the House of Lords was afterwards entered in the minutes in the following form :

It was this day *ordered* and *adjudged*, that so much of the decree complained of as declares the personal estate to be the primary fund for payment of the several sums of 1,200 l., 3,400 l. and 500 l. therein mentioned, be and the same is hereby reversed : and it is further *ordered* that the executors, the plaintiffs, are to have their costs of the suit in the Court of Chancery (Ireland) out of the personal estate according to the directions of the said decree, and that they do also have their costs of this appeal out of the same estate.

(a) 12 Price, 214.

(b) 7 Ves. 332. The observations particularly referred to are to be found at pp. 335-6

## A P P E A L

FROM THE COURT OF CHANCERY.

1835.  
March 17.JOHN HARCOURT POWELL - - - - *Appellant.*ANNA GRIGBY - - - - - *Respondent.*

By a marriage settlement, certain freehold lands, together with the mansion-house and park of the settlor, were given to trustees to pay to the settlor's wife, if she should survive him, 1,000 *l.* a year clear from all deductions whatever. The settlor by his will confirmed the settlement, and gave the mansion-house and park to his wife for life, remainder to his nephew, to whom he also gave his copyhold estates in England and his estates in Pennsylvania, the latter free from all incumbrances whatever: he created two rent-charges, payable out of his real estates in England. *Held*, that the devise to the wife of the lands charged by the settlement was not intended to merge the charge in the settlement, and that she was, therefore, entitled to enjoy the mansion-house and park without any deduction being on that account made from the annuity, which was to be raised entirely out of the other English estates held by the nephew.

*Will, construction of.  
Rent-charge.*

BY Indentures of Settlement, dated 28th and 29th of December 1826, executed in contemplation of the marriage of Joshua Grigby, then of Drinkstone, in the county of Suffolk, with the Respondent, Anna Grigby, then Anna Crawford, spinster, after reciting the intended marriage, &c., it was witnessed that in consideration thereof, and for making a provision for the Respondent, should she survive her husband, he did grant, &c.,

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unto certain persons therein named, the mansion-house in which he then lived, and divers freehold lands, with the park, &c. (expressly excluding his copyhold property), to hold the same, with their appurtenances, to the use of Joshua Grigby, and his assigns, for his life, without impeachment of waste; and after his decease, to the use and intent that the Respondent, and her assigns, in case she should survive him, should, from and immediately after his decease, during her natural life, receive and take, out of the said hereditaments and premises, one annuity of 1,000*l.* free and clear of and from all taxes and deductions whatsoever, in full of her jointure, and in lieu of dower; and if it should happen that the said annuity of 1,000 *l.*, or any part thereof, should be behind and unpaid for the space of thirty days, it should be lawful for the Respondent to enter and distrain on any part of the premises mentioned, or to enter and hold the same, and to take the rents and profits thereof, and of every part thereof, until she should be satisfied the annuity of 1,000*l.* and all arrears thereof, and also so much thereof as should accrue or grow due during such time as the Respondent should continue in the possession of the same premises after such entry, together with such costs, &c., as should be occasioned by the non-payment thereof, and subject to, and charged with the said yearly rent or sum of 1,000*l.* and the means and remedies thereinbefore provided for recovery thereof, to the trustees for the term of 99 years, for the further and better securing the payment of the annuity of 1,000 *l.*, as the same should become due unto the Respondent at the times appointed, for which a power was given to the trustees to levy the arrears or to mortgage the premises for payment of the same.

The marriage was duly solemnized shortly after the execution of the settlement.

On the 10th of February 1829, Joshua Grigby made his last will and testament, duly executed to pass real estates. The will contained the following among other provisions:—"I give and devise unto my wife, Anna Grigby, and her assigns, for and during the term of her natural life, all that my mansion-house, with the yards, gardens, stables, coach-houses, and appurtenances now in my own occupation, at Drinkstone aforesaid, and also all that my park thereto; and I direct that trees and timber shall be cut down off my estates in the parishes of Hawstead, Hessett, and Drinkstone, and sold to pay the expense of any repairs, painting or glazing, which in the opinion of the said Anna Grigby, shall at any time be required for any of the said hereditaments so given and devised to her for life; also for the expense of insurance of the said premises from fire, which I direct shall be done, and that my nephew John Harcourt Powell (being the Appellant) or his heirs, executors or administrators shall point out, at proper times, what trees shall be felled for those purposes, and if he or they neglect, or refuse to do so for one month after notice in writing shall be given to him or them, then the said Anna Grigby shall cause to be cut down, and sell such trees as she shall think proper for those purposes, and I confirm the settlement made on my marriage with my present wife. And I give and devise, and direct to be paid out of all the rest of my real estates in Suffolk, unto my sister Charlotte Grigby, during her life, 220*l.* a year, to be paid by equal payments, the 1st day of January, April, July and October, free of all charges. I direct that a yearly sum of 15*l.* be paid by the aforesaid payments, to the widow

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of Thomas Eaves, my bailiff, for her life, and that she be permitted to live without rent in the house she now resides, and subject to those two annuities, and other conditions above specified, I give and devise all my real estates in England, from and immediately after my death, and also all the above-mentioned hereditaments so given to my said wife for her life, and from and after her decease unto my said nephew John Harcourt Powell, his heirs and assigns for ever; also I give and devise unto the said John Harcourt Powell, and his heirs for ever, all my estate in the State of Pennsylvania, without any incumbrance or restriction whatsoever; and I give and devise to my said nephew, John Harcourt Powell, and his heirs, all and every my trust estates, messuages, lands, and hereditaments, and all my mortgages in fee, to hold the same according to the respective trusts, natures, and tenures thereof; and I direct that all my paintings and portraits in my house at Drinkstone, be enjoyed with the same by my wife for life, and after her death to go with the house, and subject to the payment of my debts and the expenses of carrying this my will into effect. I give and bequeath all my household furniture, plate, linen, china, wine, stores, all the rest residue and remainder of my personal estate and effects whatsoever and wheresoever, and of every kind, unto my said wife Anna Grigby, for her own sole use and benefit."

The testator died on the 6th of March 1829, and the Respondent and Appellant respectively entered into possession of the premises devised to them. In July 1831, the Respondent filed her bill in Chancery, to have the arrears of her annuity paid to her in full from the time of her husband's death, without any deduction on account of the mansion, park, and other

premises then occupied by her. The Appellant in his answer insisted on the liability of all these premises to contribute towards the payment of the annuity. On the 9th of June 1832, (a) the Vice-Chancellor decreed in favour of the Respondent, and ordered the arrears of the annuity to be raised by mortgage upon the premises held by the Appellant.

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The present appeal was presented against that decree.

Mr. *Knight* and Mr. *Preston* for the Appellant:—  
This rent-charge is *prima facie* a charge upon the whole estate. It would be so in the hands of an ordinary purchaser. It is doubtful whether the rent-charge is not extinguished by the devise. It is only the accident of the term that preserves it at all, if indeed even that can be said to preserve it. It is a general rule, that where there is a rent-charge upon land, and part of that land comes into the possession of the owner of the rent-charge, he loses the rent-charge (b). The Respondent here, by accepting the devise, discharged the rent-charge. The term is only an accessory security for the thing, and if the thing itself is gone the security for it is gone too. The rent-charge here is gone. If the Respondent had wanted to enforce her annuity at law, she must have gone against the terre tenant. This Appellant is a termor, not the terre tenant. She is one of the terre tenants. She could not be demandant and defendant at the same time, and that is the true reason why the rent-charge is extinguished; but if not extinguished, then there is nothing in the will to show that the Respondent does not take the land devised to her, subject to all the incidents to it. The provisions as to the

(a) See the case reported 5 Sim. 290.

(b) Litt. 222 & Co. Litt. 147 b.



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repairs of the house, by no means show that she was to take it free from all incumbrances whatever. The direction in the will upon this subject, was given in order that the mansion-house should be kept up for the benefit of the family, not for the Respondent's exclusive advantage. If there had been a mortgage on this mansion-house and park, she would take them subject to the mortgage, and this jointure is in effect a mortgage. That it was not the intention of the testator that the Respondent should enjoy the lands devised to her free from this incumbrance, is plain, for he knew how to express his intention, and might have used here, as he has done in other parts of the will, expressions to show that these lands were to be free from such incumbrances. When giving the annuity to his sister, and the widow of his bailiff, he says, that it is to be paid out of all the rest of the estate; why could he not use the same expression here, if he had the same intention? He created those two annuities as new rent-charges on the estate; if he had meant this to be a new rent-charge, he would have used the same terms in creating it. If it is the old rent-charge created by the settlement, then it is a charge upon the whole of the estate, and could only be so recovered at law or in equity. If this was a quit rent, or an ancient fee-farm rent, the lands would clearly be liable in her hands. It is the same thing in principle with this annuity. The mere fact, that she was the wife of the testator, cannot supply the want of clear words of exemption. *Knight v. Calthrope* (a) will probably be relied on by the other side, but that case is clearly not law, for there no term existed, and there was no settlement by the will, so

(c) 1 Vern. 347.

that the rent-charge was clearly extinguished. The judgment in that case was, therefore, erroneous in principle. In the present case it may be admitted, that it was the intention of the testator to preserve the rent-charge *modo et formâ* as it was granted, but that was upon the whole of the estates, not on part of them.

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Mr. *Pemberton* and Mr. *Tinney* for the Respondent :  
—The general rule as to extinguishment of a rent-charge (*d*), stated on the other side, may be admitted, but if, instead of coming in as by purchase, the party comes in as heir, there is no extinguishment, but the rent may be apportioned (*e*), for there the heir comes in by act of law, and not by his own act. For the purpose of this case, if it is to be decided by that general rule, the Respondent is entitled to enjoy equal privileges with the heir. But the intention of the testator must decide this case, for it is admitted that, as a general rule, there would be a merger operating on the land burdened with the rent-charge, but for the proof of an opposite intention on the part of the testator. That opposite intention is marked with sufficient plainness in this case. Suppose here, that the testator had simply given his mansion-house and park to his wife before going to a stranger, and had expressed his anxiety that she should enjoy them in the most ample and beneficial manner ; if he had stopped there, no one could have believed that he meant that the rule of law should apply, and that she should lose the rent-charge. But he has done much more. The case of *Knight v. Calthrope* is law, and fully

(*d*) Litt. 222. & Co. Litt. 147.

(*e*) Litt. 224. & Co. Litt. 149 b.

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warrants what is now contended for, but it is not so strong as this case, for there there was no confirmation of the settlement by the will. Here there is an express confirmation of it. The expressions of the testator as to the completeness of the enjoyment of this property by his widow are very strong, and he has given the mansion-house and park first, then confirmed the settlement, then given other bounties, and then given the real estate to the Appellant. The subsequent dispositions of the will, not overruling the first, must be taken subject to them. It is absurd to suppose that he intended to provide, as he has provided, for securing his wife against the expense of repairing the mansion-house, and yet meant that the rent-charge, on which she was to be maintained, was to come partly out of that very mansion-house. The expressions as to the annuities to his sister and his wife, instead of being against the Respondent, are in her favour. He was then creating two new charges, and if he had not specially appointed out of what fund they were to be satisfied, they would have been payable partly out of the property devised to his wife. To protect her against such a mischief, he made this special provision.—[Lord Brougham: Might she not repudiate the devise for life and take her annuity?—Yes, but if she did, she would either be rejecting the wish of her husband, to occupy the mansion-house and park, or else in complying with it, by living there with crippled means, would be injuring herself and defeating the wish which he entertained, that she should live in comfort and affluence as his wife was entitled to live.

Mr. *Preston*, in' reply :—There never was a lawyer who thought *Knight v. Calthrope* was law.—

[Lord *Brougham*: The law as laid down by Lord Jeffries in that case is too general. There is no mention of intention in the report of that case in Vernon. The principles of law and the cases throw the burden of proof on the party who denies the merger, but Lord Chancellor Jeffries throws it there upon the party who sets up the merger.]—That case is contrary to all principle, but it is the only authority to be found in favour of the decree now appealed from; if that case cannot stand, this decree must be reversed.

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There is no case in which, even if the rent-charge was taken by act of law, it would not be liable to apportionment. Wherever a widow by act of law becomes endowable, or takes a portion of the property in lieu of dower, she is uniformly obliged to contribute to the burdens charged upon the property of which she so becomes possessed. The question now discussed must have been present to the mind of the testator when he gave two other charges out of the residue of the land, and where he wished to fix a charge on a particular portion of property he well knew how to attain his object.

Lord *Brougham*, after stating the case, said, My Lords, the question in this case arises upon the construction of a will, and is in substance whether a rent-charge payable to the wife, created originally by settlement, is to be paid with arrears entirely out of the residue of the estates not devised to the wife for life, or whether those which are so devised to her are to bear a portion of the charge. The law that would regulate this case being clear, and being admitted to be so, namely, that there would be

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a merger operating upon the land burdened with the rent-charge, but for some intention on the part of the testator of an opposite kind being proved, which shall prevent that law from taking effect, the whole question resolves itself into one of fact, to be arrived at by conclusions drawn from principles of law, namely, whether or not there exists in this case sufficient proof of intention to contradict this rule of merger. The Vice-Chancellor on the facts of this case held, that there was evidence of this intention sufficient to prevent the merger, and decreed that the estates in the settlement, other than and except these estates, were liable to pay and make good the jointure; and that the estates devised to the widow for life were free and exempt from liability to contribution thereto. On the best consideration that I can give the case, I am of opinion that he came to a sound conclusion. Let us advert to the circumstances which are to be gathered from the relative situation of the parties, and see whether they do not justify his conclusion. But first one word with respect to the principle of law: I shall say nothing upon the distinction taken as to the holder of an estate, on which there is a charge, coming into possession of it by act of law, or by his own deed; for this case must be decided on another ground. The principle of law on which I shall proceed has been stated distinctly enough, without going back to the times of Littleton and Coke, in *Chester v. Willes* (f). That report in Ambler is incorrect in its references to the cases in Vernon (g), for there does not appear from the report in Vernon any intention in one of

(f) Ambler, 246.

(g) *Thomas v. Kenneys*, 2 Vern. 348, and *Powell v. Morgan*, id. 90.

these cases to prevent a merger. I cannot find any case exactly in point with the present.

As to the case of *Knight v. Calthrope*, I doubt whether we should ever have heard of this appeal if it had not been for that case. Counsel relied on it unnecessarily in the court below. The language there was not half so strong against merger as in this case. That case is not now law; if it was, it would be inconsistent with *Chester v. Willes*, for in the last Lord Hardwicke threw the burden of proof on the party who said that there was no merger; while Lord Chancellor Jeffries had held that there was no merger unless it was proved that one was meant to take place.

We now come to the application of the law to this case. I set aside the relation of husband and wife, for that proves but little; but I think that there are four circumstances, which, when taken together, bring the case within the rule as laid down by Lord Hardwicke. The first of these is, that from the beginning the testator intended that his wife should enjoy the mansion-house and park in the manner most beneficial to herself, and he treated it throughout as a part of the property which did not yield any profit; nay, more, he provided a fund out of which reparations were to be made, and he made his wife the judge, without control, of some of the repairs that might be wanted. Moreover, these repairs were to be done by the devisee of the reversion, and within a limited period of time, and if within that period he did not elect what trees should be cut down for the repairs, she was to decide upon them. With this favourable mode of treating her it is most improbable that the testator should throw on her the burden of paying a portion of this rent-charge out of pro-

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perty which he throughout treated as yielding no profit. This forms the second of the four grounds on which I think that the Vice-Chancellor came to a sound conclusion. The third is the principal ground of the whole. After having so provided for his wife, he expressly confirms the settlement made on his marriage. It was necessary to do that; but it is observable that the confirmation is coupled with the preceding direction by the conjunction "and," as if it was in addition to them; and this mode of confirmation must be taken to mean, "notwithstanding what I have given you in my will, I confirm the settlement." This is the most simple and probable mode of reading the will. Then, again, and lastly, the estate given to his wife is expressly exempted from contribution to the annuities created for the benefit of his sister and the widow of his bailiff; and to aid the construction I have been putting on the will as showing the intention of the testator, there is a gift to the Appellant of the estates in Pennsylvania without any incumbrance or restriction whatever. This is not in itself a strong circumstance, but it illustrates the general view taken of the case with respect to the testator's intention as to the incumbrances subject to which the English estates given to the Appellant were to be taken by him. On the whole, I incline to agree with the Vice-Chancellor on this subject of construction, which is always, more or less, one of uncertainty. Looking at the circumstances of this case, I see abundant reasons to justify me in supporting his decision, and none that would justify me in reversing it; and my opinion proceeds not in any way upon *Knight v. Calthrope*, as reported in Vernon, or referred to in the Equity Cases Abridged, but on a ground consistent with the decision in *Chester v. Willes*,

namely, that the will shows an intention on the part of the testator to prevent a merger. I do not think, under all circumstances, that this a case which requires costs.

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Judgment affirmed without costs.

## A P P E A L

FROM THE COURT OF EXCHEQUER IN EQUITY.

1834.  
June 9, 14 &  
16.  
July 9.

ROGER HOLDSWORTH, JOHN ROBSON,  
R. S. THOMPSON, and WILLIAM } *Appellants.*  
WRIGHT - - - - -

THOMAS LODINGTON FAIRFAX, Esq. } *Respondents.*  
and BENJAMIN EAMONSON, Clerk -

Lord Fairfax, by a codicil to his will, in the year 1671, gave all his tithes of Bilborough in fee (subject to an estate therein for the life of R. S.) to Henry Fairfax and his heirs and assigns, to the use of a preaching minister there, to be nominated by said H. F. and his heirs. The heir of H. F. conveyed the tithes with other property to trustees for sale for payment of his debts, and they were accordingly sold and conveyed by the said trustees in 1716 to R. F. and J. H. and their heirs, on trust as to the tithes to the use of a preaching minister to be nominated by R. F. and his heirs. J. H. (who was only trustee for R. F.) surviving R. F., became seised of the legal estate, and his descendants continued so seised in succession until 1826, when his heir-at-law conveyed the said tithes upon the original trusts to T. L. F., the heir of R. F. T. L. F. had in 1721 nominated B. E., the preaching minister of Bilborough. HELD, in a suit by T. L. F. and B. E. for an account of tithes in Bilborough, that this was a valid nomination of B. E. It appeared from the evidence, that the tithes of Bilborough had been appropriated to an alien priory, dissolved by stat.

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27 Hen. 8th; that Henry 8th afterwards demised them for 21 years by the description of *omnes decimas garbarum et fæni*; that Edward 6th, by letters patent, granted them to H. and W. and their heirs, by the description of *omnes illas decimas garbarum, granorum, bladorum, fæni, lanæ et agnellorum ac alias decimas nostras quascunque, &c.*, and that the title to them under that grant was vested in T. L. F. and his nominee. There was no mention of rectory or advowson in the grant. There was no trace of any endowment for a vicar or curate at any time in Bilborough. HELD, that the grant included the rectory and comprised all tithes of every description arising in Bilborough, and the decree ordering an account of them to T. L. F. and B. E. was affirmed.

THIS was an appeal from a decree of Lord Chief Baron Sir William Alexander. The bill, filed by the Respondents in Easter Term 1826, prayed against the Appellants, and other Defendants who are not parties to the appeal, an account of the single value of all titheable matters (except corn, which they were ready to yield) had and taken by them respectively from lands in their respective occupations, and that they might respectively pay to the Respondent, the Rev. Benjamin Eamonson, what, upon taking such account, should appear to be due to him.

The bill stated, among other things, that Thomas, Lord Fairfax, being, at the time of making the codicil therein and hereinafter mentioned, and thenceforth to the time of his death, seised in fee-simple of all the tithes of corn, grain and hay, and all other tithes whatsoever, great and small, arising, &c. within the parish of Bilborough or the titheable places thereof, duly executed a codicil to his will, dated the 11th of November 1671, and thereby gave to Richard Stretton, his domestic chaplain, "all his tithes of Bilborough

and Sandwith, in the county of the city of York, for and during the term of threescore years, if he, Richard Stretton, should so long live, provided he would supply the office of a preaching minister there, or procure one to do it; and afterwards the remainder in fee of the said tithes he (the testator) gave to Henry Fairfax, of Oglethorp, and his heirs and assigns for ever, to the use and behoof of a preaching minister there, to be nominated by the said Henry Fairfax and his heirs." That the said testator died without having altered or revoked his said codicil, and thereupon the said Henry Fairfax (who, by the death of the said Thomas Lord Fairfax without issue male, became Lord Fairfax) became seised of the said tithes and premises, subject to the said estate therein of Richard Stretton, and continued so seised to the time of his decease, and died intestate as to the said tithes and premises, and that the same thereupon descended to his eldest son and heir-at-law Thomas Lord Fairfax, who died so seised thereof to the uses aforesaid, whereupon the same descended to his eldest son and heir-at-law Thomas Lord Fairfax, who, being so seised thereof to the uses aforesaid, by indentures of lease and re-lease, bearing date respectively the 13th and 14th of July 1716, for the considerations therein mentioned, granted and conveyed to Robert Fairfax (the great grandfather of the Respondent, T. L. Fairfax) and John Hardwick, their heirs and assigns (amongst other hereditaments), all the said tithes of Bilborough and of Sandwith, and the advowson or patronage, donation and nomination of a preaching minister to the parish church of Bilborough, to hold unto and to the use of the said grantees, their heirs and assigns for ever, in trust, nevertheless, as to the said tithes of Bilborough and

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Sandwith, to the use and behoof of a preaching minister there, to be nominated by the said Robert Fairfax and his heirs. And by an indenture, dated the same year, John Hardwick acknowledged the consideration to have been paid by Robert Fairfax out of his own monies, and that his name was used in trust only for Robert Fairfax and his heirs; and he covenanted to convey the premises therein-mentioned accordingly, so as such conveyances and assurances for and concerning the said tithes should be to the use of a preaching minister there, to be nominated by Robert Fairfax and his heirs. That the said Robert Fairfax died in the year 1725, leaving John Hardwick him surviving, and the legal estate of the said tithes and premises became solely vested in him; and that by divers mesne conveyances, and ultimately by indentures of lease and release dated respectively the 19th and 20th March 1826, the release being made between William Parkins (who was the eldest son and heir-at-law of Richard Parkins and Catherine his wife, the great niece and heiress-at-law of the said John Hardwick) of the first part, the Respondent T. L. Fairfax of the second part, and Jonathan Gray, gentleman, of the third part, the said tithes of Bilborough and Sandwith, were (with other things) conveyed by the said William Parkins unto the Respondent T. L. Fairfax, his heirs and assigns for ever, upon the same trusts, nevertheless, as to the said tithes, as the said William Parkins held the same, and as were mentioned in the said in part stated indenture of release, of the 14th of July 1716, and that the said advowson or patronage, donation and nomination of a preaching minister to the parish church of Bilborough aforesaid, previously to the year 1821, descended upon and became and was then vested in the Re-

spondent T. L. Fairfax, the heir-at-law of the said Robert Fairfax; and the Respondent B. Eamonson had been since the year 1821 the minister of the said parish church, to which he was in that year duly nominated by the Respondent T. L. Fairfax, and licensed by the Archbishop of York, and had ever since officiated in the said church as minister thereof, by performing service therein; and during all the time the Respondent B. Eamonson had been and then was entitled, under the trust aforesaid, to receive all and every the tithes arising, growing and renewing within the said parish of Bilborough and the titheable places thereof.

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The bill further stated, that the Appellants and the other Defendants thereto, then were, and long previously to the appointment of the Respondent B. Eamonson as minister as aforesaid, had been respectively the occupiers of divers farms, lands and tenements in the parish of Bilborough, and that certain payments by composition had at times been accepted by the former ministers of the said church from the occupiers, for the time being, of the said several farms, lands and tenements, in satisfaction of tithes; that the Rev. Mr. Lambe, the last minister, accepted and received from such occupiers respectively a composition of 5 s. per acre; and the Respondent B. Eamonson, on being appointed minister, accepted and received from them a similar payment in lieu of tithes, until such composition was dissolved by mutual consent as between him and the Appellant R. Holdsworth, in 1823, and by written notices to the other Appellants in 1824, from which periods respectively the bill charged, in the usual manner, the perception of tithes, by the Appellants and the other Defendants, of the titheable matters on their respective farms,

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lands and tenements without accounting for the same to the Respondent B. Eamonson; and further charged, that no other person than the Respondent B. Eamonson claimed, or was entitled to the said tithes, and that the composition payment of 5 s. accepted by him and his immediate predecessor, was in lieu of tithes of all titheable matters taken by the Defendants from their respective lands, and not in lieu of the tithes of corn only.

The Appellant, R. Holdsworth, by his answer, denied that the Respondent, T. L. Fairfax, had a right to nominate a minister to the church of Bilborough, and that the Respondent, B. Eamonson, was duly nominated thereto. The other Appellants, and the Defendants who are not Appellants, by their joint and several answer to the Bill, said, amongst other things, that they were informed, and believed, that the prior and convent of the Holy Trinity, within the City of York, were, at the time of the dissolution of that priory (27th Henry 8th), seised of certain portions of tithes, described as "*decimæ garbarum de Drynghouses, in Knapton, Bilborough, et certorum clausorum infra dominium de Sandwith,*" and that Thomas Lord Fairfax was, at the time of making his codicil in the Bill mentioned, seised in fee simple of the said portions of tithes in Bilborough, and the closes within the Lordship of Sandwith, which had belonged to the said prior and convent, and that these portions comprised the tithes of corn and grain only, and no other tithes, of certain parts of the parish of Bilborough. All the Appellants and the other Defendants admitted their information and belief that Thomas Lord Fairfax was, at the time in the Bill in that behalf mentioned, seised in fee simple of the tithes of corn, but of no other tithes, arising within certain parts of the parish

of Bilborough, and of certain closes within the Lordship of Sandwith; and that he executed such codicil, of such date, to such purport and effect as in the Bill was mentioned. They also admitted their respective occupations of certain farms, &c. in the parish of Bilborough and Lordship of Sandwith, and the perception by them respectively of all the tithes arising from them, without accounting for the same, except the tithe of corn; and they said that compositions had been paid at various times to the Respondent B. Eamonson, and to his immediate predecessor, for the tithes of corn and grain only, and not of anything else growing on their farms, except such of their farms as paid no tithes or were covered by moduses which they particularly described, and some of which are mentioned in the subjoined decree.

The Lord Chief Baron, having heard the cause in December 1829, by his decree, bearing date the 11th of November 1830, directed an account to be taken of the value of all and every the titheable matters and things (except corn) taken by the Appellants and the other Defendants from the lands in their respective occupations, except the lands in the occupation of the Appellant J. Robson, belonging to the Free Grammar School of Newark-on-Trent, and his farms called Newhall, Moscars and Normans, as to which he ordered the bill to stand dismissed; and he ordered that the Appellants and the other Defendants should severally pay to the Respondent, B. Eamonson, what should upon such account, when taken, be found due from them respectively, with costs of suit to both Respondents, who were ordered to pay J. Robson his costs, as far as the bill related to his said farms of Newhall, Moscars and Normans. (*See the report of the case, with the Lord Chief Baron's judgment,*

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1 Younge, 79 to 111, where the deeds and ancient documents, and other evidence in the cause, and in this appeal, are very fully stated.)

The appeal was from the whole decree, except so much thereof as directed the bill to be dismissed, with costs as to J. Robson's said farms.

Mr. *Agar* and Mr. *Koe* for the Appellants :—The questions in this appeal are, first, whether the Respondent, T. L. Fairfax, was, in the year 1821, entitled to the tithes devised by the codicil of Thomas Lord Fairfax, and to the nomination of a minister to the church of Bilborough, pursuant to that codicil ; secondly, whether the tithes devised by Thomas Lord Fairfax's codicil, under which the Respondents made title, were the tithes of corn only, which the Appellants are willing to yield, or all tithes whatever, both great and small, arising on the lands mentioned in the codicil.

It was admitted in the court below that the Respondent, T. L. Fairfax, is not the heir-at-law of Henry Fairfax, the devisee named in the codicil of 1671, and that he does not claim the tithes or the right to nominate the minister through any consanguinity with him. The descent of the right to the tithes was broken by the heirs of Henry Fairfax, whose son and heir, Thomas Lord Fairfax, for the purpose of securing payment of his debts, conveyed to trustees with power of sale all his lands, tenements, tithes, &c. His (the last-mentioned Lord Fairfax's) creditors, after his death, filed their bill against the trustees, and against his eldest son and heir-at-law, who was also Thomas Lord Fairfax, and compelled a sale of the trust estates for the payment of the debts and other incumbrances. At that sale Robert Fairfax, under whom the Respondents claimed, purchased part of the hereditaments,

including the manors and tithes of Bilborough, &c., and they were conveyed to him, and to his trustee John Hardwick, their heirs, &c., by the indenture of July 1716, recited in the pleadings, in trust as to the tithes, to the use of a minister to be nominated to the church of Bilborough by the purchaser and his heirs. That conveyance was executed by the trustees appointed to pay Lord Fairfax's debts, and the consideration paid by Robert Fairfax was applied in discharge of those debts and other incumbrances. The devise of the tithes, by the codicil of 1671, to the use of a preaching minister was a purely charitable trust, to be executed by Henry Fairfax and his heirs only. The trust could not be sold or otherwise alienated *Attorney-General v. Rigby (a)* for a pecuniary consideration or for payment of debts, and therefore the suit in Chancery to compel a sale of the estates of Thomas Lord Fairfax could not affect the nomination of a minister or the tithes of Bilborough, of which that Lord Fairfax was only trustee. It is a rule of the courts of equity that a trustee shall not derive any benefit to himself from the trust. If a charitable trust could be sold it would be liable to abuse, and the objects of the trust would suffer by the sale. The case of the *Attorney-General v. Brentwood School (b)*, on the authority of which the Respondents rest their case, was different from this, and not at all applicable. If the tithes and power of appointing a preaching minister had passed by the conveyance to Robert Fairfax and John Hardwick, the same would have been vested in the heir of John Hardwick, the survivor of the two, in the year 1821, when the Respondent B. Eamonson was nominated to be preaching minister at Bilborough, and for some

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(a) 3 P. Wms. 145.

(b) 3 B. & A. 59.



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years afterwards. When an advowson is conveyed to a trustee or mortgagee, it is necessary that the nomination and presentation to the benefice should be made by the person in whom the legal estate is vested, and not by the person who is entitled to the beneficial interest. B. Eamonson was never nominated by the heir of John Hardwick. The tithes, and the right of nomination of a preaching minister, were not conveyed to the Respondent, T. L. Fairfax, until the 21st March 1826, and there did not become due from the Appellants any tithes whatever in Bilborough between that time and the 9th of May 1826, when the Respondents filed their bill. This point was only slightly noticed by the Lord Chief Baron at the end of his judgment. But it was important to consider whether, if Mr. Fairfax could have a legal title at all to nominate the minister, he had that title in 1821; for if he had not, Mr. Eamonson was not duly appointed, and therefore had no right to any tithe.

The devise, by the codicil, was only of a portion of tithes, and not of a rectory, or of a benefice, which entitles the possessor to tithes generally. It is incumbent upon any person, and more especially a layman, who claims a portion of tithes, to prove clearly to what monastery or other ecclesiastical body such tithes belonged, of what such portion of tithes consisted, and in what manner and by what conveyances he derives his title thereto, or that he should establish his title to such tithes in a court of law, before he is entitled to an account in a court of equity. *Charlton v. Charlton* (b); *Norbury v. Meade* (c). It appeared from the several ministers' accounts, which contained an account of all the tithes and hereditaments to which the alien priory of the

(b) Bunb. 325.

(c) 3 Bli. 211.

Holy Trinity in York was entitled, that the only tithes to which that priory was entitled in Bilborough, were the tithes of corn, which were given to the Crown upon the dissolution of that priory in the 27th of Henry 8th. They were demised by that monarch to Sir Leonard Beckwith for 21 years, under the description of the tithes of sheaves and hay, and were then worth 6*l.* 10*s.* a year. The bill of particulars by which John Wright and Thomas Holmes required to purchase the tithes of Bilborough from the Crown, described the tithes to be the tithes of corn only, and to be of the yearly value of 6*l.* 10*s.*, and to be demised to Sir L. Beckwith at that rent; and although King Edward the Sixth, by his letters patent, granted to Wright and Holmes "all those his tithes of corn, grain, blades, hay, wool and lambs, and other his tithes whatsoever arising in Bilborough, then or lately in the tenure of Sir L. Beckwith, formerly belonging to the late priory of the Holy Trinity in the City of York;" yet where a bill of particulars had been proved, which showed what tithes the parties agreed to purchase from the Crown, courts of equity have construed letters patent granted in pursuance thereof, not to extend to more tithes than were mentioned in the bill of particulars. The purport of the letters patent to Wright and Holmes was a grant of all the tithes in Bilborough, then or lately in the tenure of Sir Leonard Beckwith, to the late priory of the Holy Trinity formerly belonging, and not of all tithes whatever. It appeared by the lease to Sir L. Beckwith, which had not expired at the date of the letters patent, that the only tithes demised to him were the tithes of corn and hay (*garbarum et fæni*), which lately belonged to the priory of the Holy Trinity; And all the ministers' or collectors' accounts, of the

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priory of the Holy Trinity, stated that such priory was entitled only to the tithe of corn in Bilborough; therefore, if the Respondents were entitled to any tithes in Bilborough, it would be to the tithe of corn only, but the decree here appealed from directed the Appellants to account for all tithes whatever, which far exceed all the tithes mentioned even in the letters patent; and it further directed that account to be taken for six years before the filing of the bill, although the legal title was not vested in Mr. Fairfax until 1826, a few weeks before the filing of the bill. On these grounds, and after citing many cases (*d*) in support of them, they submitted that so much of the decree as was appealed from ought to be reversed.

Mr. *Simpkinson* and Mr. *Duckworth* for the Respondents:—The case attempted to be made for the Appellants is, that the Respondent Fairfax had not the right of nominating the minister of the parish of Bilborough; that the other Respondent was not well appointed; and lastly, that if both these objections should be overruled, still the Appellants were not liable to account for any tithes except the tithes of corn which are not in dispute. They allege that the benefice was a mere charitable trust in Henry Fairfax and his heirs, and was not alienable. It is quite true that the tithes were given, by Lord Fairfax's codicil, in trust to the use of a preaching minister, and could not be conveyed away from the object of the trust; but the nomination of the minister was on a different footing, not a charitable trust in Henry Fairfax, but property, as much as an advowson would have been,

(*d*) The same cases that were referred to in the argument in the Court below. 1 You. 85 and 86.

and which could be alienated and conveyed like other ecclesiastical preferments. The right of nominating the minister of this parish was, with other things, conveyed away for sale by the descendant and heir-at-law of Henry Fairfax, and it was actually sold in 1716, under a decree of the Court of Chancery, when Robert Fairfax, the ancestor of one of the Respondents, became the purchaser. There was no distinction between this case and the common case of advowsons, which were constantly the subjects of sale and assignment; so also the right of nomination to a benefice or a school was clearly assignable; *Attorney-General v. Floyer* (e); *Attorney-General v. Master of Brentwood School* (f). The latter was a case sent by the Master of the Rolls for the opinion of the Court of King's Bench, and the question for consideration there was the right of nominating the master of a grammar school, founded and endowed by a private individual by virtue of the King's letters patent, which ordained that the school should be in the patronage and disposition of the founder and his heirs, by whom the schoolmaster and wardens should be nominated. All the Judges of that Court certified that the right of nomination was lawfully alienable, and no case could be stronger than that in support of the title of the Respondent Fairfax. But this was not the case of a foundation by Thomas Lord Fairfax; he being the rector impropriate, and holder of the small as well as of the large tithes, as his will and other documentary evidence showed, was bound to provide a minister for the parish, there being no endowment for a vicar or curate, *Bonsey v. Lee* (g); and, being aware of

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(e) 2 Vern. 747.

(f) 3 Barn. & Adol. 59.

(g) 1 Vern. 297.

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that objection, he availed himself of the Act 17 Charles 2, c. 3, s. 7, then recently passed, to give the tithes in trust in perpetuity for the benefit of a minister or curate. Though the tithes could not be diverted from the minister, the right to nominate the minister was clearly alienable. The case of the *Attorney-General v. Rigby* was not applicable to this case.

It was also urged for the Appellants, that the right of nomination, if it was at all in T. L. Fairfax, was not in him in 1821 when he nominated Mr. Eamonson, because the legal estate was in the descendants of Hardwick. But by the terms of the deed of 1716, the right of nomination of the minister was conveyed to Robert Fairfax and his heirs; that was, of course, the legal right of nomination. It was proved in the cause that the two ministers immediately preceding Mr. Eamonson, were nominated by the heirs of Robert Fairfax, and that the Respondent, T. L. Fairfax, was the heir-at-law of Robert Fairfax. But supposing the legal right to have, in 1821, been in Parkins, the heir of Hardwick, as trustee, they submitted that he was bound to appoint the nominee of the person beneficially or equitably entitled, and that if he refused to do so a bill would lie to compel him, *Gully v. Serjeant Selby* (h). They further cited, upon this part of the case, 17 Vin. Abr., Title *Presentation*, pp. 300, 314 and 324. Presentation was not necessary to this benefice; the nomination to it was reserved, by the deed of 1716, to Robert Fairfax and his heirs; and in pursuance of that deed, T. L. Fairfax, the heir-at-law, nominated Mr. Eamonson. The question then was, whether Eamonson and the patron had not a right to the tithes when they filed their bill? That a person,

(h) 1 Strange; 403.

who is equitably entitled to tithes, has a right to file his bill for an account of them, is a proposition which is supported by the cases of *Crayhorne v. Taylor* (i), *Lowther v. Bolton* (k), and the late cases of *Glegg v. Legh* and *Cherry v. Legh* (l), in which Lord Eldon overruled Lord *Redesdale's* dictum in *Norbury v. Meade*, which was overruled also by Lord Lyndhurst in *Elliot v. Davenport*.

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Upon the other question in the cause, namely, what tithes were devised by the codicil to Lord Fairfax's will, the learned counsel referred to the documentary and other evidence read in the Court below, and in their arguments they cited the cases there cited, and adopted the reasoning of the Lord Chief Baron upon the effect of the evidence, concluding from it that Lord Fairfax was seised not only of the tithes of corn but also of the tithes of hay and all other tithes, great and small. They observed, upon the word *garbarum*, which the Appellants would confine to "*sheaves, or perhaps hay*," that it extended not only to hay, *Barsdale v. Smith* (m), *Oglander v. Lord Pomfret* (n), but also to flax, *Anon* (o), to peas and beans, *Sims v. Bennett* (p), to woad, *Baskerville v. Clarke* (q), to seed-tares, *Dawes v. Benn* (r), and even to agistment, *Illingworth v. Leigh* (s).

With respect to the objection on behalf of the Appellants, that the letters patent of Edw. 6 to Holmes and Wright, could not grant more than they required by their bill of particulars to purchase, the learned counsel cited two acts, 1 Edw. 6, c. 8, and 7 Edw. 6,

(i) 2 Bro. P. C. 512.

(k) 3 Gwill. 1120.

(l) 1 Bli. N. S. 302 and 306.

(m) Cro. Eliz. 633.

(n) 3 Gwill. 1244.

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(o) 1 Eag. & You. 369.

(p) 2 Gwill. 887.

(q) 3 Gwill. 1567.

(r) 1 Barn. & C. 751.

(s) 3 Gwill. 1614.

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c. 3. confirming grants of Henry 8 and Edward 6, notwithstanding any mis-recital or mis-description, and cases decided on those statutes, *Dickinson v. Reade* (t), *Baker v. Bacon* (u), *Regina v. Lewis* (x), and two anonymous cases in Dyer's Reports, pp. 269a and 350b, insisting, upon these authorities, that the rectory passed by King Edward's letters patent, notwithstanding any mis-description of the tithes, and that that doctrine was adopted by Mr. Justice Bailey in the case of *Dawes v. Benn* (y). Lord Fairfax was seised, in 1671, of all the tithes that were granted by these letters patent.

Upon another question, argued in the Court below, but not much insisted on in the appeal, namely, whether the decree and proceedings in a former suit (*Fairfax v. Wright*), for tithes of the same lands between the minister nominated by the heir of Robert Fairfax and an occupier, were admissible as evidence in this suit, the following cases were cited: *Scott v. Allgood* (z), *Travis v. Chaloner* (a), *Freeman v. Phillips* (b), *Illingworth v. Leigh* (c), *Ashby v. Power* (d).

Mr. *Agar*, in reply, insisted that the Respondent's bill was defective in form, and that the authority of the case of *Norbury v. Meade*, which he before cited to that effect, was not shaken by what Lord Eldon said in *Cherry v. Legh*. That was not like this case, and Lord Redesdale was, in matters of pleading, better authority than Lord Eldon. The case of the *Attorney-General v. Rigby* showed that one cannot sell or mortgage a trust for a charitable purpose. The

(t) 1 Gwill. 358.

(u) Cro J. 48.

(x) 1 Leon. 119.

(y) 1 Barn. & C. 762.

(z) 3 Gwill. 1372.

(a) 3 Gwill. 1237.

(b) 4 M. & S. 486.

(c) 3 Gwill. 1614.

(d) 3 Gwill. 1238.

legal estate having been in Parkins till 1826, the nomination of Eamonson, in 1821, by T. L. Fairfax alone was not sufficient, even if the right to nominate the minister had been well derived to his ancestor Robert Fairfax, and therefore no tithes were due to them when the bill was filed.

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The case having stood over for consideration, it was, on this day, ordered, without any observation, that the petition of appeal be dismissed, and that the decree of the Court below be affirmed, without costs.

July 9.

## A P P E A L

FROM THE COURT OF CHANCERY.

July 10.  
August 12. 15.

JAMES STALEY - - - - - *Appellant.*

JOHN KING and THOMAS HINDLE - - *Respondents.*

King gave Kemp an undertaking in writing in these words :  
“ Mr. Kemp, when the title to the Philpot-lane estate is perfected, and the same shall be regularly conveyed to me by all the parties, I will be accountable to you for the sum of 3,000 *l.* upon receiving a proper release from you and Mr. Wilson.—John King.” The title was perfected, and the estate was conveyed to King, and he continued in the undisturbed possession thereof, but refused to account with Kemp for the 3,000 *l.* Kemp and B. filed a bill against King, alleging that the 3,000 *l.* was the consideration for Kemp’s equitable interest in the estate, and for his procuring a conveyance of the same to King ; that he borrowed money of B. on the assignment to him of the above undertaking, and that Wilson was Kemp’s agent. King, by his answer, denied that Kemp had any interest in the said estate, or that he procured the conveyance of it to King, but he said that it was for Wilson’s interest he agreed to give 3,000 *l.*, and that Kemp’s name was used in the undertaking in order to protect Wilson from any claim by his assignees, he being

*Contract in  
Writing not  
binding without  
other proof.*



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an uncertificated bankrupt; that the dealing was with Wilson, and through him with the vendors of the estate. HELD, in the absence of proof of the allegations in the Bill, that certain letters from Wilson to B. justified the inference that Kemp was not entitled to any account from King in respect to the undertaking; and the decree dismissing his bill was affirmed with costs.

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IN January 1821, Thomas Bignold and Robert Kemp filed their bill in Chancery against John King, which was afterwards amended, thereby stating, among other things, that, in the year 1818, Robert Kemp entered into a contract for the purchase of lands and hereditaments in Philpot-lane, London, at a very low price; that shortly afterwards he contracted with King to sell to him his equitable interest in the said lands and hereditaments at a premium of 3,000*l.*; and it was stipulated between them that Kemp should procure the conveyance to be made to King immediately from the vendors, and that, upon the conveyance being executed, King should pay the vendors the sum contracted to be paid to them by Kemp in part of the purchase-money, and should pay Kemp the further sum of 3,000*l.*, the consideration of the transfer of his equitable interest.

The bill further stated, that Kemp being in immediate want of 3,000*l.*, and the investigation of the title and the preparing of the conveyance being likely to occasion delay in the payment of the 3,000*l.*, Kemp requested King to give him an undertaking in writing for the payment of that sum, in order that Kemp might thereby be enabled to raise 3,000*l.* immediately; and that accordingly King gave Kemp the following undertaking in writing: "Mr. Kemp, when the title to the Philpot-lane estate is perfected, and the same shall be regularly conveyed to me by all the parties,

I will be accountable to you for the sum of 3,000*l.*, upon receiving a proper release from you and Mr. Wilson for the same. I am yours, John King. 15th June 1818." That after that undertaking had been given, Kemp applied to Thomas Bignold, and requested him to advance to him the sum of 3,000*l.*, upon an assignment to Bignold of the agreement so entered into with King; that Bignold was induced to agree thereto, upon condition that he should not have to wait above three months for the fulfilment of King's undertaking; that accordingly a memorandum of the transfer of the interest of Kemp in the said agreement with King, and of the benefit of the aforesaid undertaking, was drawn up; and the same was sent to King, and was then in his possession or power; and that memorandum was as follows: "Esteemed friend King, be pleased to pay Thomas Bignold, or his order, pursuant to thy letter to me, dated the 15th inst., the sum there mentioned; and his receipt shall be thy discharge. Thine, R. Kemp. 27th June 1818." That the undertaking of the 15th of June 1818 was by Kemp put into the hands of Bignold, and he paid the 3,000*l.* to Kemp, in consideration of the transfer to him of the benefit of the said agreement with King. That afterwards, in consequence of difficulties made by King, which occasioned more than three months delay in the performance of his said undertaking, it was agreed between Bignold and Kemp and Richard Wilson, (the person in the undertaking, dated 15th of June 1818, named) that the said sum of 3,000*l.* paid by Bignold should be returned to him; but that Bignold, who was then a creditor to a considerable amount of Kemp and of Wilson, should from time to time make further advances to them; and should hold the said undertaking, signed by King, as security

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to him, as well for the payment of the sums then due to him from Kemp and Wilson respectively, as also for the payment of all such sums as he should thereafter advance for the use of Kemp and Wilson, or either of them. That Bignold, on the faith of such agreement, and also of King's said undertaking, made further advances to a considerable amount to Kemp and Wilson respectively before the year 1821; and that there was, in that year, justly due to Bignold, from Kemp and Wilson respectively, a sum exceeding 5,000*l.* That it was agreed between Bignold and Kemp that Bignold should take to the said undertaking signed by King, and all the benefit thereof, for his own use, in discharge of all right of personal demand by way of action against Kemp for the amount due from him to Bignold. That some time after the memorandum, dated the 27th June 1818, was deposited with King, the title of the said lands and hereditaments was perfected, and Kemp procured the conveyance of them to be made from the vendors immediately to King, and such conveyances were duly executed, and King was in the undisturbed possession of the said lands and hereditaments. That Bignold and Kemp had applied to King, and requested him, upon the execution of a proper release, to pay Bignold the said sum of 3,000*l.*, being the consideration money for the aforesaid assignment or transfer of Kemp's interest in the said premises, but that King absolutely refused.

The bill charged that King had not paid any part of the 3,000*l.* to Bignold or Kemp, and that Wilson acted as the agent of Kemp in making the contract for the purchase of the said lands and hereditaments, and had no interest in such contract, and that such contract was in writing, and duly signed by the vendors or their agent for that purpose, and that if the

said agreement between Kemp and King for sale of Kemp's equitable interest as aforesaid, was not made and entered into by Kemp personally, on his part, it was made and entered into by Wilson, as agent for Kemp. And the bill prayed, among other things, for a discovery and account of what was due for principal and interest, on King's said undertaking and agreement, and that he might be decreed to pay to Bignold what should be found due on taking such account upon a proper release being executed to him.

The Respondent, King, put in his answer, which was to the effect hereinafter stated; but before any further proceedings were taken, Bignold was declared a bankrupt, and the Appellant and another person, since deceased, were appointed his assignees. Kemp died insolvent, since the filing of the bill, and the Appellant having obtained letters of administration, became his legal personal representative. In January, 1828, the Appellant filed his bill by way of bill of revivor and supplement against the Respondent King, making the other Respondent Hindle, a party defendant, as the surviving assignee of Richard Wilson, who had been declared a bankrupt in 1816, and continued to be an uncertificated bankrupt in the years 1817, 1818, 1819 and 1820. The supplemental bill, which was several times amended, after stating the original bill and the prayer thereof, and the subsequent matters as above stated, and that it was filed by the Appellant, with the consent and authority of the creditors who had proved debts under the commission against Bignold, charged that King was still in possession of the said lands and hereditaments, and that if the agreement between Kemp and King, for the sale to King of Kemp's equitable interest as aforesaid, was not made and entered into by Kemp personally, it was made and

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entered into on his part by Wilson, as his agent; and everything thereinbefore mentioned to have been done or transacted by Kemp, which was not done or transacted by him personally, was done or transacted by Wilson as his agent, and that King had in his possession or power, divers documents, letters, papers, and writings, relating to the matters in the bills mentioned, and material to be produced. And the supplemental bill prayed, that the suit might be revived against the Respondent King, and that he might answer the same, and that the Respondent, Hindle, might also answer the said original bill, and the supplemental bill, and that the Appellant might be at liberty to prosecute the original suit and might have the benefit thereof, and of the proceedings therein, and of the facts in the supplemental bill stated, against the Respondents respectively, and that it might be declared, that no release from Wilson or Hindle to King was necessary, or that Hindle might be ordered to execute such release if necessary, and that a receiver of the rents and profits of the said lands and hereditaments might be appointed, &c.

The Respondent, King, by his answer to the original bill in 1821, and to the supplemental bill in 1828, denied that in the year 1818, or at any other time, Kemp entered into any contract or agreement for the purchase of the lands and hereditaments in the said bills mentioned, but this Respondent believed, that the said lands and hereditaments had, in that year, been put up to sale by public auction by Mr. Burton, auctioneer, and that the same having remained unsold, Burton afterwards offered them for sale by private contract. And Respondent was informed, and believed it to be true, that Richard Wilson, then and at the time of filing the Respondent's first answer being an

uncertificated bankrupt, afterwards applied to Burton, and contracted with him for the purchase of the said lands and premises for his own use and benefit for the price of 10,500 £., and that such contract was reduced into writing, and signed by Wilson, who therein also undertook to pay some deposit in respect of his said purchase within a certain period therein limited, but failed so to do; and shortly afterwards Wilson was introduced to this Respondent by Robert Kemp, and represented to be the *bond fide* purchaser of the said lands and hereditaments upon speculation, and that he (Wilson) was then unable to complete his contract, and that the price contracted to be paid for the same was a very low price, and that the said bargain was advantageous to the purchaser. And this Respondent denied that Kemp did contract with him to sell his pretended equitable or other interest in the said lands or hereditaments, but he admitted that, influenced by the representations of Wilson and Kemp, touching the value of the said premises, he (this Respondent) was induced to consent to give to Wilson 3,000 £. to relinquish the benefit of his contract in favour of Respondent, and to pay to Wilson the said sum, over and above the price contracted by him to be paid for the said estate, as soon as the title thereto should be approved and the conveyances perfected. And this Respondent and Wilson immediately afterwards went to the house of the said Burton, and Burton, at the request of Wilson, and well knowing this Respondent, consented to cancel the said contract between him and Wilson, and the same having been accordingly cancelled, a new contract in writing was drawn up and signed by and between Burton and this Respondent, for the sale and conveyance of the said estate, at the same price which Wilson was to have paid for the same.

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This Respondent, by his answer, further admitted, that after a very considerable lapse of time from Respondent's first entering into such contract with Burton, Kemp requested Respondent to give him an undertaking in writing for the payment of 3,000*l.* for the better security, as this Respondent then understood, of Wilson, and to protect him by such payment to or in the name of Kemp, against any claims that might be set up by Wilson's assignees, in respect of the monies to be paid to him by this Respondent under such agreement, and not in order that Kemp might thereby be enabled to raise the said sum of 3,000*l.* immediately, or for any other purpose: and Respondent did give to Kemp an undertaking in writing of the date, and to the purport and effect in the bill mentioned, and he was solely induced to give such undertaking as evidence that he would pay the 3000*l.* upon the contract being completed; and that the name of Kemp was made use of in such undertaking at the desire of Wilson, for the purpose of protecting him from any claims that might be set up by his assignees to the said 3,000*l.* And Respondent was still further induced to give such undertaking upon an understanding between all parties that this Respondent should on the completion of the purchase retain in his hands the sum of 500*l.* out of the said sum, which Respondent had agreed to give Wilson for the transfer of his interest in the contract, for the purpose of liquidating certain claims which Respondent had against Kemp; and this Respondent admitted that some memorandum of an intended transfer of the interest of Kemp (who was considered by Respondent as a mere trustee for Wilson) in the said agreement with this Respondent, was drawn up by Kemp and sent to this Respondent; but Respondent had since lost or mislaid the same, and was unable to set forth

whether it was in the words or to the effect in that behalf mentioned in the bill.

This Respondent further admitted, that some time after the said memorandum was sent to him, the title of the aforesaid lands and hereditaments was perfected, and the conveyance thereof executed to this Respondent, and he had been since in the undisturbed possession of them ; but Kemp did not procure the said conveyance to be made from the vendors thereof to Respondent, and Kemp's interference in the completion of the said purchase was wholly unnecessary, and he never did interfere therein, or take any trouble about the same, after he had introduced Wilson to this Respondent, and brought about such contract between them for the transfer of the interest in the said purchase. This Respondent admitted that he had not yet paid the said 3,000*l.*, or any part thereof, to Bignold and Kemp, or either of them, and he was advised that Wilson, as an uncertificated Bankrupt, was not competent to enter into such contract as aforesaid, and that Respondent could not with safety pay him or any person for his use the said 3,000*l.* without the consent of Wilson's assignees, but he was always ready to pay the same to Wilson or his assignees, or any person legally entitled under his and their authority to receive the same, upon having a release or discharge duly executed to this Respondent for the said money ; and he insisted that to whomsoever the said sum of right belonged, this Respondent ought in nowise to be charged with any interest whatsoever in respect thereof, the same having been agreed to be paid by him as a mere loan or premium. This Respondent had no knowledge of several of the matters alleged in the supplemental bill, and he denied that the contract between him and Wilson for the sale to him of Wilson's equitable interest in the bill men-

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tioned, was entered into with him by Wilson as the agent of Kemp; and he did not believe that Bignold paid Kemp the 3,000*l.* in the bill mentioned.

The Respondent, Hindle, put in his answer to the original and supplemental bills in December 1828, stating the bankruptcy of Wilson, as it was stated in the said bills, and that Wilson was an uncertificated bankrupt in the years 1817, 1818, 1819 and 1820, and Respondent, as his sole acting assignee, claimed such rights and interest as Wilson had, if he had any in the matters in question in the suit; but he did not know that Wilson, if he had not been a bankrupt, would have had any right or interest therein.

The case was heard by the Vice-Chancellor in 1831, when the Appellant's counsel, in support of his case, read passages from the answer of King to the original bill, and some letters written by Wilson to Bignold, which were proved as exhibits in the cause. One of these letters, dated the 25th of January 1820, contained the following passage:

“ It has always been known to you, the money in King's hands has always been the only tangible means I had to settle my affairs with you, and in order to make this the more certain, and to afford me temporary assistance, and to add to your better security, was the only grounds for my placing in your hands the only document which can relieve the above difficulty now, although I find that I miscalculated on your support for temporary matters, still I never despaired of your support when an effectual arrangement took place in my affairs, and particularly after the repeated assurance to support me when an arrangement took place; it is true I have no right to call upon you to lend me money against your wishes, but I consider I have a just claim to call upon you for the necessary support or return of that which is the only

instrument I have to depend upon, and which was deposited with you upon faith and honour, and if I know you at all, it only requires you to be reminded of what becomes your duty to do, what conscience dictates to be just between man and man ; and I think you cannot be the man that would wish to keep me in this situation after I have surmounted the great difficulties I have with Pickfords, leaving out of the question your own interest in the completion of the arrangement, but when that is taken into the consideration, I say it is a reflection upon your understanding not to take the most effectual means possible to forward it, and it is nothing but a strong conviction on my mind of your not having a proper view of the bearing of this business that can at all excuse you with me ; however, I trust enough has been said to claim that attention it deserves, to either do the one thing or the other, and either way will accomplish my object of a final settlement of all difficulties.

“ I am, Dear Sir, yours truly,

“ *R. Wilson.*”

Another letter by the same to the same, in 1820, was as follows :

“ Dear Sir—By the arrangement now made with Pickfords, I shall be able to effect an arrangement with creditors with a loan of 500*l.* instead of 2,000*l.*, on the receipt of the agreement from Mr. ——— which I expect every post. It is my intention to send off a person to each creditor, with the means to pay the composition as agreed upon, and get, at the same time, their signatures to the *supersedeas* ; to do this and pay all expenses, and some other contingencies, will require 500*l.*, which, if you are disposed to assist me with, I can only say it will confer a lasting obligation ; with regard to security, you know as much of my means

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and situation as I can tell you, and therefore I have nothing to say on that head further than I am disposed to make any arrangement you may think necessary, and that is within my power.

“ I am, &c.

“ Thomas Bignold, Esq.”

“ *R. Wilson.*”

Another letter from Wilson to Bignold, written between July and November of the same year, had this postscript: “I was glad to hear the other day that you had got possession of the 3,500 *l.* from King; I hope this is correct.”

It was proved by a clerk in the bank of Perring & Co., in 1818, that in that year a sum of 3,000 *l.* was, by a check drawn on them by Bignold, placed to the account of Kemp.

The Vice-Chancellor made the following decree: after reading certain orders made in the cause, one of which was made shortly before the hearing for payment by King of the 3,000 *l.* into court, which was accordingly paid in by him, and was vested in the purchase of 3,681 *l.* consols, and after reading the accountant-general's certificate, whereby it appeared that the said sum in Bank 3 per cent. annuities was standing in his name in trust in the cause, &c, his Honor ordered that the said 3,681 *l.*, and a sum of 55 *l.* cash, on the credit of the cause, be transferred to the Respondent King, &c.; and further ordered that the bill be dismissed with costs.

The Lord Chancellor, before whom the matter was brought by appeal in December 1831, pronounced his judgment thereon in January 1832, dismissing the appeal with costs.

The Appellant further appealed to this House against the said orders of the Vice-Chancellor and Lord Chancellor.

Mr. *Knight* and Mr. *G. Richards* for the Appellant: — King, by signing the undertaking of the 15th of January 1818, bound himself to pay the 3,000 *l.* to Kemp, as soon as the title to the estate was perfected. He admitted in his answer that the title was completed soon after, and that he continued in the undisturbed possession of the estate. He had no right to dispute the title of Kemp, or of the Appellant, who is Kemp's personal representative, to receive the 3,000 *l.* The right of suing on the undertaking was vested in Kemp, who, with the consent of Wilson, lodged the same with Bignold as security for advances to Kemp and Wilson. Bignold did make the advances upon the faith of the security of the undertaking. As the assignee of Bignold and the administrator of Kemp, in one character or the other, if not in both, the Appellant was entitled to demand from King payment of the said sum with interest on the same, from 1818. The other Respondent, the assignee of Wilson, made no claim; if he, or the creditors of Wilson, had any claim to this money, they would surely have brought it forward.

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The Solicitor-General (Sir *C. C. Pepys*) and Mr. *Pemberton* for the Respondents, (Mr. *J. Russell* and Mr. *Purvis* were with them):—

The Appellant had not established any of the material allegations on which his claim was founded, and the case stated by him, in the bills, was entirely fictitious and contrary to the truth; he pretends that Kemp had some equitable interest in the premises in Philpot-lane, and that King agreed with Kemp to give him 3,000 *l.* for that interest. Or these two allegations his suit proceeded, and they were both utterly false; Kemp never had any interest, legal or equitable, in

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the premises in Philpot-lane ; King never purchased, nor agreed to purchase of him any interest in these premises; neither Kemp nor Bignold had at any time such an interest in the matters of this suit as entitled them to sue King. No consideration moved directly or indirectly from either Kemp or Bignold for the undertaking of the 15th June 1818, and neither of them had any interest in the undertaking or in the sum mentioned in it; but even if Kemp had had any valid claim against the Respondent King upon that undertaking, such claim was the proper subject of an action at law, and was not a matter of equitable jurisdiction.

If the Appellant was constituted sufficiently for the purposes of this suit personal representative of Kemp, which was not the case, still he would not be entitled to any relief in that character, because his claim in the character of such personal representative had been introduced into the record irregularly; neither was he entitled to sue as assignee of Bignold, because he had not shown that the supplemental bill was filed and the suit prosecuted with such consent of Bignold's creditors as was required by the Bankrupt laws.

The evidence read in the Court below, which was the only evidence in the cause, not only did not prove the allegations contained in the bills, that the money in question belonged to the Appellant, either as the assignee of Bignold or as the personal representative of Kemp, but, on the contrary, distinctly proved that the same belonged to Wilson, an uncertificated bankrupt, to whose assignee, or to any other person entitled, the Respondent King was willing to pay the money, but without interest.

The *Lord Chancellor*, after touching on the points urged in the arguments, recommended their Lordships to postpone their judgment until he could have time to consider the question.

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*His Lordship*, in moving the judgment, said: This, My Lords, was an appeal from my own judgment in the Court of Chancery, affirming a decision of his Honor the Vice Chancellor. I stated, in the course of the arguments at your Lordships' bar, the difficulties which I felt upon the questions that were brought for your decision. The principal one was this: it appeared that the Respondent, King, had made the contract in his undertaking nominally with Robert Kemp, in whose right the Appellant claims; but then it was urged that the name of Kemp was used for Wilson's name, as he was an uncertificated bankrupt; and if the property was purchased in his name, his assignees might hear of it, and could come upon it. That latter suggestion appeared so reasonable, that it satisfied me, in the absence of all proof to the contrary, as it had satisfied the Vice-Chancellor in the Court below; and I shall not now detain your Lordships further on the case than to move that your Lordships affirm the judgment appealed from, and with costs.

Aug. 19.

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By order of this date, the decree of the Court below was affirmed with 419*l.* for their costs to the Respondents.

Aug. 15.

## A P P E A L

1835 :  
9d, 3d, and  
13th July, and  
8th Sept.

FROM THE COURT OF CHANCERY.

1836 :  
19 Aug.

The Right Hon. the Earl of DURHAM - *Appellant*.

JOHN WHARTON, Esq. and SUSAN MARY }  
ANN, his Wife - - - - - } *Respondents*.

*Marriage  
Portion.  
Satisfaction of  
Legacy.*

W. L. bequeathed 5,000 *l.* to the daughter of his brother J. L. charged on his real estates, and authorized the interest thereon to be raised for her maintenance, if J. L. should so direct; and he devised his real estates so charged to J. L. in fee. J. L. bequeathed 10,000 *l.* in trust for his daughter for life, and after her death, in trust for *her children*, and declared that that sum should be in addition to the sum to which she was entitled under W. L.'s will. The daughter afterwards married. Her father advanced to her husband 15,000 *l.* as her marriage portion, and, by the settlement, pin-money and a jointure for the wife, and portions for the *younger children of the marriage*, were provided out of the husband's property, and the 15,000 *l.* were declared to be in satisfaction of the sums to which the wife was entitled under W. L.'s will. The father died in 1794; no demand was made for the 10,000 *l.* until 1826. HELD by the Lords (reversing the decrees of the Vice-Chancellor and Lord Chancellor) that the 10,000 *l.* legacy was satisfied by the marriage portion, assuming, as one ground of their judgment, that the daughter was apprised of the contents of her father's will soon after his death.

THIS case has been twice reported, first by Mr. Simons, vol. 5, p. 297, where the wills and other instruments, upon the effect of which the question in the cause arose, are fully stated; and again, upon appeal, by Messrs. Mylne and Keen, vol. 3, p. 472,

where the Vice-Chancellor's decree, affirmed by the Lord Chancellor, and now appealed from, is set forth, in substance. The latter report also contains (pp. 473 and 474) the only positive evidence that was given, on behalf of the Respondents, of their alleged ignorance of the contents of General Lambton's will up to the year 1826.

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Another allegation of the Respondents, which was strongly urged by their counsel in the Court of Chancery and before the Lords, but as strongly denied on the other side, was that Mrs. Wharton was the favourite child of her father. The witness examined on behalf of the Respondents on that point, deposed that he knew General John Lambton, the testator in the cause, for 10 years before his death, and had frequent opportunities of seeing him and his four children (including the Respondent, Susan Mary Ann Wharton), in London, and in the county of Durham. Deponent never heard the said John Lambton express any particular affection or regard for any one of his four children in preference to the other, but he thought that Susan was his favourite child; and his reason for thinking so arose from the circumstance of her being the person employed by the others, when deponent and they were together, to speak to the testator to effect any private object, though of a trivial character. Deponent was not aware, after so long a time, of any particular circumstance touching the matter in question, but his general impression, and the feeling of his mind was, that Susan Mary Ann was the favourite child of her father.

The Master, to whom the cause was referred by the Vice-Chancellor's decree, by his report made in pursuance thereof, and dated the 20th of April 1834, certi-



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fied that he calculated interest on the legacy of 10,000*l.* to the Respondent, Susan Mary Ann Wharton, at the rate of 4 per cent. per annum, from the death of the testator, in March 1794, up to the date of the report, and he found the legacy and the interest thereon to amount together to the sum of 26,038*l.* 7*s.* 1*d.* This report was confirmed.

Lord Durham appealed as well from the order confirming the report, as from the decree of the Vice-Chancellor and the decree of the Lord Chancellor affirming it.

Mr. *Bickersteth* and Mr. *Pemberton* (Mr. *Stephenson* was with them), for the Appellant, pursued nearly the same course of argument that was used by the counsel for the Appellant in the Courts below, relying chiefly on the rule of courts of equity, by which a legacy given by a father to a child is held to be adeemed or satisfied by a portion, subsequently given by the father upon the marriage of that child. The propriety of applying that rule to this case was confirmed by the identity of the sum advanced on the marriage of the Respondents with the amount of the sum named by the testator in his will as the intended portion of his daughter. It was assumed in the Courts below that these sums did not exactly correspond in amount, because there might have been an arrear of interest, alleged to amount to 2,000*l.*, on the 5,000*l.* due to Mrs. Wharton at the time of her marriage, under the will of her uncle, William Lambton; but it might be seen by looking into that will, that no interest could become payable on that legacy to Mrs. Wharton until she attained the age of 21 or married. The trustees of that will were authorized, until the legacy became payable, to pay her father the

interest of it for her maintenance and education, if he so directed them, but no such direction was given by her father. Mrs. Wharton resided with, and was maintained by her father until her marriage, which took place on the same day on which she attained the age of 21. It was, therefore, a mistake to suppose that any interest was due to her on that legacy at the time of her marriage, and the legacy itself was then paid, together with her portion, making together the sum of 15,000 *l*.

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The Master reported that the legacy of 10,000*l*., together with the interest on it since the general's death, amounted to 26,000*l*. and upwards. If it should be held that that legacy was not adeemed, still all claim to interest on it must be considered to be barred, by reason of the length of time which the Respondents permitted to elapse without bringing forward their claim, for it was impossible, under the circumstances, to suppose them ignorant of the bequest in General Lambton's will.

In addition to the authorities referred to in the reports of the case in the Courts below, they cited *Platt v. Platt* (a) (in which they said that the Vice-Chancellor, after full consideration, pronounced a decision quite opposite to his decree in the present case), and *Weall v. Rice* (b), decided by the late Master of the Rolls.

Sir William Horne and Mr. Knight (with whom was Mr. Pole), for the Respondents, used the same general arguments and cited the same cases that they had successfully urged before the Vice-Chancellor. They distinguished the case of *Weall v. Rice* from

(a) 3 Sim. 503.

(b) 2 Russ. & Myl. 251.

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this, admitting that the Master of the Rolls there came to a proper conclusion. As to the case of *Platt v. Platt*, they observed that, as reported, it was inconsistent with the authorities that were referred to in the report. That case came before the Vice-Chancellor in 1830, and his Honor might be said to have more experience in the decision of the present case in 1832, or to have considered the circumstances to be different. The probability was that his Honor's attention had not been drawn to the difference between the limitations in the will and in the settlement in that case, as it was in this; certainly his Honor had not the slightest notion, on hearing this case, that he had ever decided any such point; for he had in vain asked counsel, and so did the Lord Chancellor on the appeal, to refer him to any case, in which, the limitations of the portions in the will and settlement being different, the one was held to adeem the other. It was, therefore, to be inferred that the point said to be decided in *Platt v. Platt*, was never brought before either of the Courts in the arguments in the present case.

Sept. 8.

Lord *Lyndhurst*, (on the last day but one of the Session of Parliament, after having moved judgments in other cases), observed, that this was a case of importance, both as regarded the sum in dispute and the principle of law involved in it. There was a difference of opinion upon the question between those noble and learned Lords who had heard the case. Under these circumstances, therefore, it would not be fitting that any decision should be now given, in the absence of the noble and learned Lord who had decided the question in the Court below. It was necessary that some communication should take place between his noble and learned friend, and another noble and learned Lord

(Lord Devon), who had attended to the case, and himself, and the result of that communication might be to remove the difference of opinion which existed. At all events, such a difference of opinion now existing, it would not be right, as regarded his noble and learned friend, who was absent(c), or just to the parties concerned in the case, that judgment should be given at present.

Judgment was postponed.

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Lord *Lyndhurst*:—The facts of this case are very particularly stated in the fifth volume of Mr. Simons' Reports; it is unnecessary, therefore, that I should enter into any minute detail of them. William Lambton by his will bequeathed to his niece, Susan Lambton, now Mrs. Wharton, a legacy of 5,000 *l.*, and he charged this with other legacies upon his real estate, which he devised to his brother, General John Lambton; General John Lambton by his will bequeathed 10,000 *l.* to Susan Lambton, and afterwards, upon the occasion of her marriage with Mr. Wharton, he gave her a portion of 15,000 *l.*, and it was stated, in the articles of agreement upon the marriage, that such portion was in satisfaction of all sums that she was entitled to under the will of the testator's brother, William Lambton. The question in the cause is, whether that marriage portion is to be taken as a satisfaction, not only of the sum to which she was entitled under the will of William Lambton, but also as a satisfaction or ademption of the portion bequeathed to her by the will of her father; whether she is entitled, in addition to the 15,000 *l.* given on her marriage, to the 10,000 *l.* under her father's will.

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There are some circumstances in this case which

(c) Lord Brougham had left London in ill health.

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strike me as singular. General John Lambton died in the year 1794; no claim to this legacy was made till 1826, a period of 32 years. It is stated, on the part of Mr. and Mrs. Wharton, that they were wholly unacquainted with the circumstance of any legacy having been bequeathed to her by her father. Now it appears that immediately after the death of General John Lambton, his will was read at Lambton Hall, in the presence of Mrs. Wharton's brother, William Henry Lambton, the sole executor of General Lambton, in the presence also of Ralph John Lambton, her brother, who was one of the trustees of her marriage settlement, and of Dorothy Lambton, her sister, who took a legacy of 10,000 £ under the will. It is very extraordinary, therefore, that Mrs. Wharton should have had no knowledge of any legacy having been bequeathed to her by her father's will. It is the more extraordinary, as upon a recent occasion she stated that she had considered herself the favourite child of her father, and thought it extremely probable that she should have a legacy under his will. This would naturally have led to inquiry. It appears to me, under these circumstances, very difficult to believe (the parties living on good terms together, and Dorothy Lambton herself taking a legacy of 10,000 £.) that it should never have come to the knowledge of Mrs. Wharton, her sister, that she also had been mentioned in the will, and that a legacy of 10,000 £. had been bequeathed to her.

But there is some evidence which has been insisted on for the purpose of leading to the conclusion that, in truth, she had no knowledge of this legacy. It seems that Lord Durham was desirous of selling a part of the property on which the legacy was charged, and he entered into a treaty for that purpose with

**Lord Eldon.** Lord Eldon required an indemnity against this legacy, in consequence of which, Mr. Ward (who was the solicitor of Lord Durham), waited upon Mr. and Mrs. Wharton, and had a conversation with them on the subject of the legacy, and in the course of that conversation Mrs. Wharton stated that she had never heard that she was entitled to a legacy under her father's will. But nothing stated by Mrs. Wharton, who is a claimant and party in the cause, can be made use of as evidence in her favour, although addressed to the agent of Lord Durham. All the presumptions then are strongly in favour of the conclusion that it must have been known at or soon after the death of General Lambton, that Mrs. Wharton had been mentioned in his will, and that a legacy of 10,000 *l.* had been bequeathed to her. Whatever inference, therefore, can be properly raised from this circumstance, ought to be raised against the claim of Mr. and Mrs. Wharton.

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Another point urged in the course of the argument was, that the amount of the two sums in the wills did not correspond with that in the settlement. It is true that the legacy left by William Lambton amounted to 5,000 *l.*, and the legacy bequeathed by General Lambton to 10,000 *l.*, those two sums together making 15,000 *l.* On the other hand, the marriage portion amounted to 15,000 *l.* But then it is said there was an arrear of interest due on the legacy of 5,000 *l.* at the time of the marriage, amounting to upwards of 2,000 *l.*; so that the sum on the one side would, on that calculation, have been in the whole 17,000 *l.* or upwards, and the sum on the other side only 15,000 *l.* Now assuming these facts to be as I have stated them, still it does not appear to me that they at all affect this

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case. It is not necessary, in order to raise the question of ademption, that the sums should exactly correspond. There are many cases (and many were cited in the course of the argument at the bar) in which the proportional difference was much greater than is supposed to have existed in the present instance. But, in truth, there is no evidence in this cause to show that any arrear of interest was due; and after a lapse of 32 years we cannot, under the circumstances of this case, assume that any such arrear existed.

It was also argued, that the limitations under the will are widely different from the limitations under the settlement, and that such difference would prevent the principle of ademption from being applicable to this case; and indeed, the point was alluded to in the judgment of the Vice-Chancellor; but I apprehend that this will not prevent the application of the principle of ademption, and that the authorities are all the other way. In the case of *Trimmer v. Bayne*(c), which was cited in the course of the argument, Lord Eldon expresses himself in these words: "The Court does not inquire whether the portion by the will is entirely and absolutely to the child, or what is afterwards advanced in this form, a settlement upon marriage, which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion;" and in another case, *Baugh v. Read*(d), which was referred to for another purpose, and in which this point had been insisted on in the argument, Lord Thurlow thus expressed himself: "Upon the marriage of his daughter he transfers part of that specific sum so men-

(c) 7 Ves. 508—516.

(d) 3 Bro. C. C. 191, and 1 Ves. jun. 257—263.

tioned, I agree, to different uses; yet I doubt whether, though not to the same uses, it will not operate as an ~~ademption~~, if not a satisfaction, being given as an advancement upon marriage." But there is a case of *Monck v. Lord Monck* (e), decided by Lord Redesdale, which is directly in point: Lord Redesdale says, "It was pressed upon me by the counsel for the plaintiff, that the variance in the provision by the settlement and the will distinguished this case. That is a circumstance which may avail to prove it not to be in satisfaction of a debt or covenant, but never of a legacy given as a provision. This distinction was taken by Lord Hardwicke in the case of *Clarke v. Sewell* (f), and in *Trimmer v. Bayne* this doctrine is recognized by Lord Eldon, wherein he states the question to be, whether, on the limitations being different, it was an ademption; and he lays down this rule, that where a parent or person in *loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances money in the nature of a portion to that child, that will amount to an ademption of the gift by will, and it will be presumed he meant to satisfy the one by the other." The same point was also decided in *Platt v. Platt* (g), by the present Vice-Chancellor. "Although there is a material difference," he observed, "between the provision made by the will and the provision under the settlement, still the one is a satisfaction of the other." The question was thus raised and presented to the mind of the Vice-Chancellor, and his Honor in that case decided in favour of the ademption. I conceive, therefore, that the circumstance of the

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(e) 1 Ball & Beat. 298.

(f) 3 Atk. 98.

(g) 3 Sim. 503.



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limitations being different does not at all affect the question.

Another point raised was this, that by the terms of the settlement the 15,000 *l.* were to be in satisfaction of all that Mrs. Wharton was entitled to under the will of her uncle, William Lambton, and it was therefore contended, that as this provision was stated to be in satisfaction of a debt due by General John Lambton, it could not also be taken to be in satisfaction or ademption of what she otherwise would be entitled to under his will. I have never felt the force of that argument. It was necessary, as far as related to the debt, that the provision in satisfaction of it should be in terms expressed; but as far as related to the provision by the will, it was not necessary, because that effect is produced by operation of law.

The case of *Baugh v. Read*, to which I before referred, was cited as an authority upon this point. That case is reported both in Brown and in Vesey, junior; the best report is in Vesey. It does not appear to me, after carefully considering that case, that it supports the position for which it was cited. By the terms of the will the legacy there given was in satisfaction of a debt due under the settlement made on the marriage of the testator. As far as related to the portion—a portion of 5,000 *l.*—in the instrument by which it was created, there was a covenant on the part of the daughter that she would, when she came to the age of 23, assign the sum that she was entitled to under the will of her grandfather. These circumstances are widely different from those of the present case; but still it was not with reference to them, as I collect from the different parts of the report, that Lord Thurlow decided the case; he

decided it with reference to the nature of the fund out of which the legacy was to be paid. That appears from many passages in the report, and it is also confirmed by the concluding passage, in which Lord Thurlow says, "it is impossible to say this is either a satisfaction or an ademption. It is not express enough. I think the father intended to give this right to a sum, expected to accumulate before his death by the addition of all these sums at least, if not of others; therefore it does not come up to that point which I should have thought it reached," (that was with respect to the ademption), "and perhaps have been wrong in so thinking, if it had been a certain sum distributed in certain proportions (*h*)."

Such are the grounds on which that case was decided, and which in truth have no application to the present question.

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I have now stated to your Lordships, the various objections which were urged at the bar for the purpose of leading your Lordships to the conclusion, that the general rule of ademption could not be applied to the present case; it appears to me that none of them are sufficient for that purpose, and that the general rule of law ought in this instance to prevail. I am, therefore, of opinion that the judgment should be reversed.

I wish to add, that the parties on both sides deprecate further delay, and are anxious for the judgment of your Lordships.

The *Lord Chancellor* put the question, and the decrees and order appealed from were reversed without costs.

(*h*) 1 Ves. jun. 265.



# APPEAL

FROM THE COURT OF EXCHEQUER IN EQUITY.

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May 12, 13  
& 14.  
June 14.

FRANCIS MORGAN - - - - - *Appellant.*

HERBERT EVANS, JOHN JENKINS and }  
PHILLIP HURD - - - - - } *Respondents.*

## *Cross Appeal.*

HERBERT EVANS - - - - - *Appellant.*

FRANCIS MORGAN, JOHN JENKINS and }  
PHILLIP HURD - - - - - } *Respondents.*

J. M. had been W. L.'s solicitor, and his agent in obtaining money on mortgages and otherwise, and also receiver of the rents of his estates; on a bill filed by W. L. against him and the mortgagees, a decree was made for a general account against J. M. and for the taxation of his bills of costs, notwithstanding there were settled accounts, signed by W. L., and securities given by him, and the vouchers delivered up to him. The decree having directed the examination of the parties, touching the matters in dispute, W. L. and J. M. filed interrogatories for their respective examinations. J. M. answered; W. L. refused to answer; whereupon an affidavit was filed by J. M., pursuant to an order of court, verifying the facts to which his interrogatories were directed; HELD by the Lords, reversing the decision of the Court of Exchequer, that this affidavit ought to be taken as evidence of the advances of money stated in it as constituting the debt claimed by J. M. from W. L., and for which J. M. held and produced W. L.'s bond.

*Client and  
Solicitor.  
Principal and  
Agent.  
Mortgagor and  
Mortgagee.*

The Master having, pursuant to the decree and to subsequent orders in the suit, made his general report, to which no  
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objections were taken, nor exceptions allowed, nor did any error appear on the face of it; **HELD** that the report could not, by an order made on the hearing for further directions, be sent back to the Master to be reviewed.

J. M. having recovered judgments against W. L. upon warrants of attorney, which purported to carry interest, and having by the decree been made accountable for the rents, received from W. L.'s estates, with interest; **HELD** that under the circumstances the judgments also ought to carry interest.

On appeal and cross-appeal, the former being allowed and the latter dismissed, the Lords, holding that the Appellant in the appeal ought, as the representative of mortgagees, in a suit originally instituted to redeem mortgages, to have had the final decree, with costs, in the Court below, gave him costs in the cross-appeal, by way of compensation.

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**THIS** is the fourth appeal to the House of Lords from the Court of Exchequer, in a suit originally instituted in the year 1783 by Sir Watkin Lewes, against John Morgan, William Farrer, James Morgan, Henry Wilder and George Morgan; all since deceased. The cause is reported, in several stages, in 3d Anstruther, 769; 4th Dow, 29; 5th Price, 42; and 3d Younge & Jervis, 230 and 394; to which, respectively, particular references will be made. The Appellant, Francis Morgan, is the sole personal representative of John Morgan, who was the principal defendant in the original and continued suit. Herbert Evans, the Respondent in the first appeal and Appellant in the cross appeal, is the heir at law of Sir Watkin Lewes; the other Respondents are his legal personal representatives.

Sir Watkin Lewes, by his bill, filed as above-mentioned, afterwards amended by adding his wife and

daughter, and the wives of John and James Morgan as parties, stated several indentures executed by him and his wife, one of which, dated December 1772, was a mortgage granted by them of certain estates in Pembrokeshire, for securing 5,000 *l.* with interest at 5 per cent. to a Dr. Kent: another, dated in March 1775, was a settlement of their estates in the counties of Carmarthen and Glamorgan; in which settlement the premises therein mentioned were limited to the said James and George Morgan, brothers of the said John Morgan, for a term of 500 years; upon trust to raise by sale or mortgage 12,000 *l.*, of which sum 5,000 *l.* was to be applied to pay off Dr. Kent's mortgage; the residue to be paid to Sir Watkin Lewes for his own use. The bill, after stating that Chardin Morgan, another brother of John Morgan, was substituted for James, in the trusts of the above-mentioned term, further stated that John Morgan, being Sir Watkin's solicitor and agent, prepared several of the indentures therein mentioned, and that having formed to himself a plan of getting Sir Watkin's estates, or a chief part of them, into his possession, proposed to lend him money on the assignment of the said term, and of the premises therein comprised; and that in order to induce him to comply with that proposal, he assured Sir Watkin that he would advance or procure the money for him at 4 per cent. interest; and that in prosecution of such plan, and by means of such promises, he prevailed on him (Sir Watkin) to execute certain instruments which he (John Morgan) had drawn up. The purport of these instruments was then stated; one was a mortgage, dated 2d June 1775, from Sir Watkin, his wife and the trustees of the premises comprised in the term to William Farrer and James Morgan, to secure

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the payment of 6,610 *l.* with interest at 5 per cent.; Another was a mortgage, dated 2d of April 1776, from the same to the same, of the said premises for the then residue of the term, to secure the payment of 8,000 *l.*, with interest at 5 per cent., which sum was composed of the above 6,610 *l.*, and a further alleged advance of 1,390 *l.*: And a third of the instruments was a further mortgage, dated 3d April 1776, of the same premises and term, subject to the last-mentioned mortgage, to secure payment of 4,000 *l.* with like interest to Henry Wilder.

The bill then stated, that a great intimacy had for several years subsisted between Sir Watkin Lewes and John Morgan, and that Sir Watkin used to employ him as his attorney and solicitor in most of his affairs, and particularly in preparing the several mortgage deeds and securities before-mentioned, and esteemed him to be a man of honour and integrity, and therefore placed so entire a trust and reliance on him, that he would, and did, readily execute any deed or writing which he (John Morgan) produced to him to be executed, without minutely or at all examining the contents thereof; and that, under such faith and confidence, he executed the several mortgage deeds and securities before-mentioned to Farrer and James Morgan, and to Wilder, without examining them. The bill charged that the said several sums of 6,610 *l.*, 1,390 *l.* and 4,000 *l.*, making together 12,000 *l.*, mentioned to be the respective considerations of the said several mortgages, were not *bonâ fide* advanced by Farrer and James Morgan, and Wilder, or any of them, or any other person on their behalf, to Sir Watkin, or to his said trustees; and also charged, that when the mortgage for 6,610 *l.* bore date, although Sir Watkin was made to give a

receipt for 6,610 *l.*, with interest from that date, as if then received, he, in fact, only received 800 *l.*; and that the greatest part of the pretended consideration of 6,610 *l.* was never advanced, but was made up of bonds, notes and other securities, before given by Sir Watkin, and of some other sums before charged to him on some other occasions, the particulars whereof John Morgan had never disclosed; and that the 1,390 *l.* was not advanced, but great part of it was kept in the hands of John Morgan, who, notwithstanding, charged interest for the whole of the said sums, as if they had been actually and *bonâ fide* advanced to Sir Watkin Lewes.

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The bill next stated, that in 1778 and 1779, actions of ejectment were brought by the said mortgagees against Sir Watkin and the tenants of the premises comprised in the term, and also against the tenants of other lands of Sir Watkin not comprised therein, and judgments were recovered in the actions, and John Morgan, by force thereof, got into possession of the estates as agent to the mortgagees; and the bill also stated, that actions of debt were brought by James Morgan, as executor of Chardin Morgan, then deceased, for 1,547 *l.* 19 *s.*, pretended to be due upon bonds; and by John Morgan, for 1,142 *l.*, pretended to be due to him upon bond, and for 569 *l.*, pretended to be due to him on an award in the bill stated; and that judgments were recovered against Sir Watkin in the said actions; and that John Morgan, by virtue of executions sued out on these judgments, seized a quantity of timber that was cut down for the use of Sir Watkin on one of his estates in Glamorganshire, not comprised in the said term.

The bill prayed that an account might be taken of all dealings and transactions between Sir Watkin



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Lewes and the defendants, and in particular between him and John Morgan, of what was really due to them respectively on account of the matters stated in the bill; and that an account might be taken of the rents and profits of Sir Watkin's estates, received by the defendants or any of them; and that so much of the sums of 6,610 *l.*, 1,390 *l.* and 4,000 *l.*, as should appear to have come to the hands of Chardin Morgan and George Morgan respectively, might be answered by James Morgan, as the representative of Chardin Morgan, and by George Morgan accordingly; and that the award in the bill mentioned might be declared to be void; and that John Morgan might be compelled to make out and deliver to Sir Watkin Lewes proper bills of his fees and disbursements claimed to be due to him, and that the same might be referred to be taxed; and that on payment to the defendants respectively of what should be found due to them on the taking of such several accounts, Sir Watkin might be let in to redeem the estates comprised in the 500 years term, and might be restored to the possession of them, and of the other estates in the possession of the defendants, and not comprised in the term; and that a receiver of the rents and profits of the estates comprised in the said term might be appointed until such redemption could be had; and that the defendants might be restrained from all further proceedings at law against Sir Watkin, touching the matters aforesaid, and from disposing of any timber then remaining unsold, and from cutting down any other timber growing on Sir Watkin's estates.

John Morgan, by his answer, stated, that his acquaintance with Sir Watkin Lewes began in 1773,

and that he procured for him, at his request, in the years 1774 and 1775, five several sums of money, viz. 500*l.*, 220*l.*, 120*l.*, 950*l.* and 400*l.*, all which were the monies of Chardin Morgan, and were *bonâ fide* advanced to Sir Watkin, and that he executed five several bonds to secure payment of the same sums respectively, with interest, to Chardin Morgan; that upon a deliberate settlement of such bonds, in 1775, with the interest due on them, and with other monies advanced to Sir Watkin, the sum total then acknowledged by him to be due from him was 2,400*l.*, for which he executed a bond to Chardin Morgan, bearing date 28th February 1775, consolidating the said five bonds. The answer next set forth the consideration for the mortgage for 6,610*l.*, averring that the whole of that sum was *bonâ fide* advanced to or for the use of Sir Watkin, and that it was made up partly of funds vested in William Farrer and James Morgan, as trustees of the marriage settlement of John Morgan and his wife, amounting to 4,209*l.* 7*s.* 1*d.*, which, together with 12*s.* 11*d.* advanced by John Morgan, and with the said bond of 2,400*l.* assigned to them, for full consideration, by Chardin Morgan, made up the sum of 6,610*l.*

The answer, after stating that John Morgan was by indenture appointed receiver of the rents of Sir Watkin's estates, to keep down the interest of the mortgages and to account for the surplus to Sir Watkin, averred the further advance of 1,390*l.* by Farrer and James Morgan to John Morgan, as Sir Watkin's attorney, for the use of Sir Watkin; and of 4,000*l.* by Henry Wilder, as a trustee of the marriage settlement of James Morgan and his wife; and that the said sum of 1,390*l.* consisted of 1,200*l.*, the produce of certain bonds described in the answer,

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and of 190 *l.* in cash advanced by John Morgan, and was added by way of further mortgage of the premises comprised in the 500 years term, for securing to Farrer and James Morgan payment of the same with interest, as well as of the 6,610 *l.*, the two sums making together a mortgage to them of 8,000 *l.*; and, subject thereto, the same premises were, by indenture of the 3d April 1776, assigned by way of subsequent mortgage to secure payment of the said sum of 4,000 *l.* with interest to Wilder. John Morgan, by his said answer, set forth several other sums as actually advanced by Chardin Morgan for the use of Sir Watkin, for which bonds or other securities were given by Sir Watkin; and he stated, that an account of various sums, advanced from time to time by himself, was delivered to Sir Watkin, and that he, after minutely examining such account, and making some deductions therefrom, allowed the same, and underwrote as follows:—  
 “February 24th, 1777, settled and allowed the above account, errors excepted; the balance, after deducting 55 *l.*, being 567 *l.*, paid by note of hand—*Watkin Lewes;*” and that Sir Watkin gave such note of hand, whereupon all the vouchers produced by John Morgan, on the settlement of the account, were delivered up to him.

The answer further stated, that an action was brought by John Morgan for the said 567 *l.*, and for five several sums of 200 *l.*, 100 *l.*, 60 *l.*, 35 *l.* and 35 *l.* alleged to have been advanced to Sir Watkin, or for his use; and a verdict was recovered therein for 1,142 *l.*, including interest; upon which Sir Watkin executed a warrant of attorney to confess judgment against him for 2,000 *l.*, to secure 1,142 *l.* with interest thereon; and that John Morgan recovered another verdict, and judgment thereon, for a further

sum of 569 *l.* due to him for bills of costs ; and he caused writs of *elegit* to be issued against certain estates of Sir Watkin not comprised in the 500 years term, on those judgments and on a judgment for 1,547 *l.* 19 *s.*, recovered by James Morgan against Sir Watkin, for monies advanced to him by Chardin Morgan.

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The other defendants also put in their answers. No witnesses were examined. Before the cause was heard, an order was made, by consent of all parties, directing the mortgaged estates to be let, and the rents to be paid to John Morgan as receiver.

On the hearing of the cause (*a*) on 2d of July 1796, it was decreed that an account be taken by the Deputy Remembrancer of all dealings and transactions between Sir Watkin Lewes and John Morgan ; and of all sums of money received by John Morgan, as agent to Sir Watkin and to the defendants, the mortgagees ; and when and how such sums were applied ; and that it be referred to him to tax the several bills of costs claimed to be due to John Morgan from Sir Watkin Lewes as his attorney, or otherwise, and to report what he should find due to John Morgan on account thereof ; and to take an account of the rents and profits of the mortgaged estates, and of the timber which had been felled thereon, and on the estates not in mortgage, received by John Morgan or by any person by his order or for his use, or which without his wilful default he might have received ; and likewise an account of the rents and profits received by him of the estates not in mortgage, and of which he had been in possession under the several judgments in the pleadings men-

(*a*) See a report of the case, with the arguments and judgment, 3d Anstruther, 769-777 ; see also 4 Dow, 29, and 5 Price, 42-59.

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tioned ; in the taking of which several accounts, and in the taxing of the bills of costs, all just allowances were to be made, and all parties were to be examined upon interrogatories touching them as the Deputy Remembrancer should direct, and he was at liberty to report special circumstances, &c. ; and if in taking the said accounts, and in taxing the bills of costs, it should appear that any vouchers in support of any articles were lost, then John Morgan was required to make oath that such vouchers did exist, and of the contents or purport of them, and that the same had been delivered up to Sir Watkin Lewes, &c.

Under that decree interrogatories were exhibited by Sir Watkin Lewes for the examination of John Morgan, and his answer thereto was put in soon after, but no further steps were then taken to prosecute the decree.

On a motion made on behalf of Sir Watkin Lewes on the 20th of June 1801, opposed by John Morgan, an order was made for a separate report of all dealings and transactions between them in respect of all monies actually received and paid on account of the mortgages and judgments, and of all monies received by John Morgan as agent to Sir Watkin and the mortgagees, and of the application thereof, and of the rents and profits of the mortgaged estates, and of the estates not in mortgage, possessed by John Morgan under executions, and of the timber, &c.

In pursuance of that order, the deputy remembrancer made a separate report, dated July 1802, whereby he found, amongst other things, that in the year 1773 Sir Watkin Lewes applied to John Morgan to raise money for him upon mortgage, and that pending the negociation for a loan, John Morgan advanced to him divers sums, the monies of his brother Chardin, and took Sir Watkin's bonds to

Chardin for securing the repayment thereof, with interest, and these bonds were afterwards consolidated by Sir Watkin executing to Chardin Morgan a bond, dated the 28th of February 1775, for 2,400 *l.* And he found that by indenture, dated the 4th of May 1775, and made between C. Morgan, John Morgan, W. Farrer and James Morgan, the two last being trustees of the marriage settlement of John Morgan and Amelia, his wife, after reciting the bond for 2,400 *l.*, and that the money advanced thereon was the proper money of John Morgan, and that the name of Chardin was made use of in trust for John, Chardin Morgan, by the direction of John Morgan, assigned that bond to Farrer and James Morgan. The report then set forth the mortgage for 6,610 *l.* to Farrer and James Morgan, and found that the said sum was made up of the bond for 2,400 *l.*, of a sum of 4,209 *l.* 7 *s.* 1 *d.*, produced by the sale of certain trust funds vested in Farrer and James Morgan as trustees as aforesaid, and of 12 *s.* 11 *d.* added thereto by John Morgan; and that the bond for 2,400 *l.* was deposited by them with John Morgan, and the 4,209 *l.* 7 *s.* 1 *d.* was paid by them into his hands, as the agent both of Sir Watkin and of the mortgagees; the report next set forth the further mortgage for 1,390 *l.* to Farrer and James Morgan, and that the same was made up of 1,200 *l.*, arising from the sale of other trust funds vested in them as trustees as aforesaid, and of the sum of 190 *l.*, added by John Morgan of his own money, and that the 1,200 *l.* was received by John Morgan, whom the report then charged with the whole sum of 1,390 *l.* as money actually received by him, as agent to Sir Watkin Lewes and the mortgagees. The Deputy Remembrancer next set forth the mortgage for 4,000 *l.* to

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Wilder, as trustee of James Morgan's marriage settlement, and found that the same was received by John Morgan as agent to Sir Watkin Lewes, and to Wilder, the mortgagee; all which said sums of 6,610 *l.*, 1,390 *l.* and 4,000 *l.* made together the sum of 12,000 *l.*; and he found, in respect of the application of the 12,000 *l.*, that John Morgan, as agent for Sir Watkin Lewes, paid to him or for his use the whole thereof; that in May 1778 Chardin Morgan died, having appointed James Morgan his executor; and in July of that year Sir Watkin Lewes executed a warrant of attorney to enter up judgment against him at the suit of James Morgan as such executor, for further securing the principal sums of 1,000 *l.* and 300 *l.* and 120 *l.* secured previously by a bond to Chardin Morgan, amounting, together with interest, to the sum of 1,547 *l.* 19 *s.*, and which judgment was entered up accordingly; and he found that in the said month of July Sir Watkin executed another warrant of attorney to enter up judgment against him, at the suit of John Morgan, for the sum of 1,142 *l.*, and which judgment was entered up accordingly; and he found that in 1779, John Morgan obtained a judgment against Sir Watkin for the further sum of 569 *l.* on account of bills of costs; and that over and above the said several sums, John Morgan had received as agent for Sir Watkin Lewes several other sums particularly mentioned in a schedule to the report, amounting together to 1,340 *l.* 4 *s.*, and that he had thereout paid on account of Sir Watkin 790 *l.* 0 *s.* 9  $\frac{1}{2}$  *d.*, and retained 530 *l.* 3 *s.* 2  $\frac{1}{4}$  *d.* residue thereof towards the discharge of bills of costs claimed to be due to him.

In taking these accounts, the Deputy Remembrancer received the several securities executed by Sir Watkin

Lewes, and the accounts settled between him and John Morgan, as evidence that the sums mentioned in them had been *bonâ fide* advanced.

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Sir Watkin Lewes took ten exceptions to the report. They were all overruled by the Court of Exchequer, by a decretal order dated 9th of February 1804, and from that order Sir Watkin and his daughter appealed to this House, as far as it overruled the 1st, 2d, 3d, 4th, 5th, 6th, and 10th exceptions (*b*).

Upon the hearing of that appeal, in 1807, the Lords reversed the order of the Court of Exchequer as to the last-mentioned exceptions, and ordered the same to be allowed, and that it be referred back to the Deputy Remembrancer to inquire and certify, as to the first exception, what sums were advanced by John Morgan as the considerations of the bonds consolidated by the bond for 2,400*l.*, and when, by whom, to whom, and in what manner such sums were paid. As to the third exception, that the same should be allowed as to the 12*s.* 11*d.*, it appearing by the said report that such sum was not advanced by Farrer and James Morgan; and that the Deputy Remembrancer should inquire and certify when and in what manner the bond for 2,400*l.* was cancelled, and whether the same was ever, and when, delivered up to Sir Watkin. And as to the fourth exception, that the same should be allowed as to 190*l.* (part of the 1,390*l.*), it appearing by the said report that the same was not advanced by Farrer and James Morgan; and that the Deputy Remembrancer should inquire and certify whether Farrer and James Morgan did ever, and when, and in what manner, receive from Chardin Morgan 1,200*l.*; and, if they did

(*b*) The exceptions, and the Lord Chief Baron's judgment overruling them, are amply set forth, 5 Price, pp. 63 to 76.



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receive it, whether they advanced the same, or any, and what part thereof, and in what manner, to Sir Watkin or to John Morgan as his agent. And as to the fifth exception, that the Deputy Remembrancer should inquire and certify how far the application of the 12,000*l.* was consistent with or different from the account set forth in the answer of John Morgan to the bill. And as to the sixth exception, that he should inquire and certify whether the several sums of 1,000*l.*, 300*l.* and 120*l.* were ever, and when, and in what manner, received by John Morgan from Chardin Morgan, to the use of Sir Watkin Lewes; and when and in what manner John Morgan first gave him credit for such sums (*c*).

Under that order, which was made an order of the Court of Exchequer, the Deputy Remembrancer made his second separate report. Sir Watkin Lewes took exceptions thereto; the exceptions were, after argument, allowed, and the Deputy Remembrancer was ordered to review his second report. In pursuance of that order, the Deputy Remembrancer made his third separate report in June 1809. To that report also Sir Watkin took exceptions, most of which were allowed, and it was ordered that the Deputy Remembrancer should review his last-mentioned report as to the matter of the exceptions so allowed (*d*).

(*c*) See this order, 46 Lords' Journals, p. 75, and the observations of Lord Redesdale and Lord Erskine, Chancellor, 5 Price, pp. 78 to 97. One of the points decided was, that as between solicitor and client settled accounts, or securities executed, are not evidence that the sums therein mentioned were advanced to the client.

(*d*) See these several reports and exceptions, and the decisions of the court upon them, 5 Price, 100 to 135. The subject matter of them was the consideration for the bond for 2,400*l.*, and for the mortgage for 1,390*l.*, Sir Watkin Lewes contending that these

On the 11th of July 1810, an order was made, on motion on behalf of Sir Watkin Lewes, consented to on behalf of the Defendants, that it should be referred to the Deputy Remembrancer to take an account and make a separate report of the principal and interest due, or claimed to be due, to the Defendants, or any or either of them, upon the securities in the cause mentioned, and otherwise, together with the costs directed by the decree made on the first hearing to be taxed, with interest from the filing of the bill in 1783, deducting thereout and giving credit for the rents and profits of the estates in the pleadings mentioned, and other monies received by the Defendants, or any of them, for the Plaintiff's use; and in taking the accounts, the Deputy Remembrancer was to make half-yearly rests, and apply the overplus, if any, after keeping down the interest of all the said monies, in reduction of the principal monies; and that upon payment by the Plaintiff of what should be found due from him upon taking such accounts, together with the costs of the Defendants, they should deliver up possession, and execute a proper re-conveyance to him of the estates. (This report was to be without prejudice to any question in the cause.)

In pursuance of the order of May 1810, the deputy remembrancer made his fourth separate report in June 1811, and Sir Watkin again took exceptions, which were allowed, by an order dated the 5th of July 1813, overruling exceptions taken to that report by John Morgan and other Defendants, and the report was referred back to be reviewed; and it

sums were never advanced; that John Morgan received for him only 4,209 *l.* 7 *s.* 1 *d.* as the consideration for the mortgage to Farrer and James Morgan for 8,000 *l.*, and that out of the 4,209 *l.* 7 *s.* 1 *d.* John Morgan advanced to Sir Watkin only 3,681 *l.* 5 *s.* 6 *d.*

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was further ordered that the Deputy Remembrancer should compute interest on the principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, which would appear after revision of the report, in respect of the allowed exceptions, to be all that was really advanced as considerations of the mortgages to Farrer and James Morgan, and to Wilder. And it was further ordered that he should take an account of the rents and profits of Sir Watkin's estates in mortgage and not in mortgage, received by Farrer and James Morgan, and by Wilder, or by John Morgan, and also an account of the monies received by them for timber cut down on the estates; which accounts were to be carried on from the foot of the account mentioned in the deputy remembrancer's report of the 16th of July 1802; and that what should have been stated as so received should be carried to the mortgage account, and set off against what should be found to be due for principal and interest on the several mortgages in the pleadings mentioned.

From that order the defendants, who had taken the exceptions, which were thereby overruled, appealed to this house, and the Lords made an order in April 1816, reversing parts of the order appealed from (*e*).

The order of the Lords having been made an order of the Court of Exchequer, the Deputy Remembrancer, in pursuance thereof, made his fifth report the 1st of February 1817, and thereby certified, in consequence of the allowance of Sir Watkin Lewes's exceptions, that

(*e*) The questions for decision in that appeal, together with the observations of Lords Eldon and Redesdale, are reported 4 Dow, 29; and the substance of the several orders, reports and exceptions made and taken in the suit from its commencement is there stated. See also 5 Price, 139; and for the order of their Lordships in that appeal, see 50 Lords' Journals, 547.

no evidence had been produced before him of the actual advance of 500*l.* as the consideration of the bond for 500*l.* of 31st January 1774, one of the bonds consolidated by the bond for 2,400 *l.*; that the sum of 4,209*l.* 7*s.* 1*d.* proved as the consideration of the mortgage of the 2d of June 1775, together with the sum of 4,000*l.* received by John and James Morgan, of Wilder, as the consideration of the mortgage of the 3d of April 1776, making together the sum of 8,209*l.* 7*s.* 1*d.*, constituted the total amount of the mortgage monies actually received by John Morgan, as agent to Sir Watkin Lewes, and to the mortgagees, in respect to the mortgage transactions; and that he had proceeded to compute interest on the said sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and to take the account of the rents and profits, and of money received for timber felled, from the foot of the account mentioned in his report of the 16th of July 1802, and had carried the monies so received to the mortgage account, and set the same off against the said principal and interest; and he found that on the 3d of September 1804, the monies so received by John Morgan for the said rents and profits and timber, exceeded the said principal sums, and all interest thereon to that time, by 999*l.* 7*s.* 10*d.*; and he found that since the 3d of September 1804, and previous to the 6th of June 1810, John Morgan had received, in respect of subsequent rents and profits of the said estates, several sums of money, amounting, together with the said 999*l.* 7*s.* 10*d.*, to the sum of 4,993*l.* 10*s.* 10½*d.*

To that report John and George Morgan, and also Sir Watkin Lewes, took exceptions. The first exception of John and George Morgan was, that the Deputy Remembrancer, instead of having found that on the 3d of September 1804, the money received by John

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Morgan, for rents and profits and timber, exceeded the principal sums of 4,209*l.* 7*s.* 1*d.* and 4,000*l.*, and all interest thereon to that time, by 999*l.* 7*s.* 10*d.*, and that since that day, and previous to the 6th of June 1810, he had received in respect of subsequent rents and profits, several sums amounting, together with the sum of 999*l.* 7*s.* 10*d.*, to 4,993*l.* 10*s.* 10½*d.*, he not having been directed or warranted by the decree or orders to make such rest in the computation of interest on the principal sums, nor to have made a rest in the account of the rents and profits and money received for timber, *he ought to have carried on the computation of interest on the principal sums, and the account of the rents and profits and money received for timber, down to the period of making his report, and then to have set off the amount of the principal and interest against the amount of the monies received for rents and profits and timber; and ought to have certified, as the fact was, that although the plaintiff had not brought down his charge for rents and profits received by John Morgan beyond the 6th of June 1810, yet John Morgan had brought in the accounts of money received for rents and profits down to the month of December 1816, up to which date the deputy remembrancer ought to have brought down such account.*

All the exceptions were over-ruled, and the report was confirmed by an order dated the 8th of November 1817. By two orders, dated respectively 18th and 27th of the same month and year, John Morgan was restrained from receiving any further rents of Sir Watkin Lewes's estates, and he was ordered to pay into Court 4,993*l.* 10*s.* 10½*d.*, being the amount of the balance found by the last report to remain in his hands, in respect of the rents and profits received by him, and

he and the mortgagees were ordered to give up to Sir Watkin the possession of the estates; and a reference was directed to the Deputy Remembrancer to take an account of the rents and profits received by them and John Morgan, and to compute interest at 5 per cent. on the sum of 4,993*l.* 10*s.* 10½*d.*, from June 1810 to the time when the same should be paid into Court: and it was ordered that John Morgan should bring into Court the sum of 4,000*l.*, the principal money secured by the mortgage to Wilder; and that the Deputy Remembrancer should make a separate report as to the amount of rents and calculation of interest distinct from his general report (*f*).

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From the several orders of the 8th, the 18th and the 27th of November 1817, John and George Morgan presented a petition of appeal to this House. That appeal was not decided until 1825. John Morgan had in the meantime been taking steps to prosecute the original decree of the 2d of July 1796. In November 1816 he carried in a state of facts before the Deputy Remembrancer, and exhibited interrogatories for the examination of Sir Watkin Lewes, which were allowed by the Deputy Remembrancer in 1818. Sir Watkin refused to put in his examination in answer: On the 25th of June 1818 an order was made that he should show cause why the said state of facts should not be taken as confessed by him; on the 13th of November 1818 that order was discharged, and it was ordered that in case Sir Watkin should make default in filing his examination to the interrogatories, by the 1st of the then next term, John Morgan should be at liberty to make an affidavit of

(*f*) The arguments of counsel and the observations by the Court in making these several orders are reported, 5 Price, pp. 139 to 167.

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the several facts to which the interrogatories were intended to apply, which affidavit the Deputy Remembrancer was to take into his consideration, and proceed in the accounts and inquiries before him under the decree of 1796. Sir Watkin did not put in any examination, and on the 12th of February 1819, John Morgan filed his affidavit in pursuance of that order. These different proceedings were stated in a supplemental paper presented to the House of Lords, for the purpose of the last-mentioned appeal ; but before that appeal was disposed of all the parties to it died.

The cause and the appeal were revived by and between the present parties, and the appeal was decided in 1825. By the order (g) then made by the House of Lords, it was adjudged that the order of Court of the 8th of November 1817, over-ruling the exceptions, should be affirmed ; that the orders of the 18th and the 27th of November 1817 should be reversed, and that the Court of Exchequer should proceed in the cause, according to the decree of the 2d of July 1796, and to the order of the 11th of July 1810 (h).

That order of their Lordships having been made an order of the Court of Exchequer, the Master, in pursuance thereof, made his general report, dated 11th December 1826, thereby finding, among other things, that John Morgan, from the year 1774 to the year 1778, both inclusive, was employed as attorney, solicitor and agent to Sir Watkin Lewes, and received or charged himself as agent to Sir Watkin, with the several sums secured by the mortgages in the pleadings mentioned, making together 13,000*l.*, on the several days on which the mortgages were respectively dated, and that he paid, or applied to the account of

(g) See the order, 57 Lords' Journals.

(h) Vide *supra*, p. 173.

Sir Watkin, the whole of the 13,000*l.*; that he also received as such agent several other sums, amounting together to 1,340*l.* 4*s.*, and paid or applied the same to Sir Watkin's accounts; that in 1778, John Morgan recovered a judgment against Sir Watkin for the sum of 1,142*l.* composed of several minor sums; and in 1779 he recovered another judgment for the further sum of 569*l.*, claimed by him to be due from Sir Watkin for bills of costs; that all the bills of costs claimed to be due to him from Sir Watkin, as his attorney, solicitor or otherwise, were before taxed by the Deputy Remembrancer, who by his separate report thereof, confirmed by an order of court, 2d July 1812, certified that he taxed the said bills at 3,829*l.* 0*s.* 6*d.*, from which sum, after deducting the sum of 2,034*l.* 1*s.* 1*d.*, received by John Morgan in money and security, there remained 1,794*l.* 19*s.* 5*d.* due to him in respect of costs. The Master further found that the several sums of 6,610*l.*, 1,390*l.*, 4,000*l.*, and 1,000*l.*, secured by the mortgages, were received and paid by John Morgan as agent to the mortgagees, and to Sir Watkin; and that the principal monies due to him from Sir Watkin, on account of the matters aforesaid, were as follows:

	£.	s.	d.
The judgment recovered in 1778 -	1,142	-	-
The judgment recovered in 1779 -	569	-	-
The balance of the taxed costs - -	1,794	19	5
Further monies paid to divers persons	107	2	5

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Making together the sum of £. 3,613    1    10

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The Master found that John Morgan, as agent of the mortgagees, received for rents and profits of the mortgaged estates, to Michaelmas, 1817 (from which

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time they were paid into Court by the receiver), several sums of money, amounting together, after deduction of payments on account of the estates, to the sum of 32,966 *l.* 12 *s.*; that he received for rents and profits of the estates of Sir Watkin, not in mortgage, to July 1794, inclusive, several sums, amounting together to 1,818 *l.* 2 *s.* 6 *d.*, and thereout paid on account of the estates, 76 *l.* 6 *s.* 11 *d.*, which being deducted from the receipts, left 1,741 *l.* 15 *s.* 7 *d.*; and that he received for timber felled on the mortgaged estates, 739 *l.* 15 *s.* 7 *d.*; and that the said several sums of 32,966 *l.* 12 *s.*, 1,741 *l.* 15 *s.* 7 *d.* and 739 *l.* 15 *s.* 7 *d.*, making together, 35,448 *l.* 3 *s.* 2 *d.*, constituted the total amount received by John Morgan for rents and profits of the said estates.

The Master further found, in pursuance of the directions of the order of the 11th July 1810, which was made part of the last order of the House of Lords, that the principal monies due on securities to the mortgagees, and the costs, consisted of the following particulars: three sums, secured by the before-mentioned mortgages, viz. 6,610 *l.*, 1,390 *l.*, 4,000 *l.*; the sum of 1,547 *l.* 19 *s.*, secured by the judgment recovered by James Morgan in 1778; (this last sum included the before-mentioned mortgage for 1,000 *l.*, and also a further mortgage for 300 *l.*, on a decree in Chancery in a cause of *Lewes v. Popkin*;) the sums of 1,142 *l.* and 569 *l.* secured by John Morgan's judgments in 1778 and in 1779; and his bills of costs, as taxed, at 1,794 *l.* 19 *s.* 5 *d.*, all which several sums together made 17,053 *l.* 18 *s.* 5 *d.*, and included all the principal monies before mentioned to be due to John Morgan, except a simple contract debt of 107 *l.* 2 *s.* 5 *d.* before mentioned; and the Master computed interest on the mortgage monies and costs, and set forth an account

of the interest, deducting such part of the principal money, as the surplus of the rents and profits, after keeping down the interest, had from time to time been sufficient to satisfy. And he again set forth the sums received from time to time for the rents and profits, together with the sums paid by the receiver for interest, pursuant to the order of the 27th of November 1817, out of the rents and profits received by him, and he made rests in the account of interest, and rents, and profits, half yearly, and applied the overplus, after keeping down the interest of the mortgage monies and costs, in reduction of all the principal monies and costs, as far as the same would extend; and he set forth the amount of the interest upon the mortgage monies and costs from time to time remaining unpaid, after deduction of the rents and profits received, when the same amounted to less than the interest due, and the amount of the overplus of such rents and profits, from time to time, when the same exceeded the interest due; and he found that there remained due, of the said principal monies, interest and costs, at the date of this report, after the deductions aforesaid, the sum of 3,597 *l.* 1 *s.* 10 *d.*; and in taking the accounts, he did not allow to the representatives of Chardin Morgan and John Morgan any interest on the said judgments.

The Appellant, F. Morgan, took two exceptions to that report; by the first, insisting that the Master, instead of having computed interest on the mortgage monies and costs, and having applied the overplus of the rents and profits, after keeping down such interest, in reduction of the principal monies due on all the securities, comprising the judgments, ought to have computed interest on the principal monies *due upon the judgments*, as well as upon the mortgages and costs,

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and applied the overplus of the rents and profits, after keeping down the interest *of all the principal monies*, in reduction of the *same principal monies*. By the second, he insisted that the Master, instead of having certified that he had not allowed to the representatives of Chardin and John Morgan any interest *on the judgments*, ought to have allowed interest *on all the judgments*, and to have stated the accounts so in his report.

These were the only exceptions taken to the general report, and they were over-ruled by an order, dated 4th of February 1827, which is one of the orders now appealed from.

The cause was brought on for hearing for further directions on the 3d of May 1827; when upon the application of the Respondents, without any previous notice to the Appellant, and without objection or exception to the report by the Respondents, the Chief Baron ordered that it should be referred back to the Master, to review his report, having regard to the first exception taken by George and John Morgan to the fifth separate report (*h*), and to the order of the Court, made the 8th of November 1817, whereby the said exception was over-ruled and the report confirmed, and also to the order of the House of Lords, dated 5th of July 1825; and that the Master should inquire, and report how far those proceedings ought to vary the balance stated by him in his report; and if he should find that such proceedings ought to vary the same, it was further ordered that he should correct such balance accordingly; and he was directed to tax F. and James Morgan their costs of the inquiry, such costs when taxed to be paid by Herbert Evans,

(*h*) See this exception, pp. 175 and 176, *supra*.

and the Master was at liberty to state special circumstances. (This is the second order now appealed from.)

On the 10th of December 1828, the Master made his report in pursuance of that order, and he found that all principal monies and interest due upon the mortgage securities were fully paid on the 3d September 1804, and that John Morgan at that date had received, for rents and profits and produce of timber felled, the sum of 999 *l.* 7 *s.* 10 *d.* beyond all the principal money and interest due to and received by him for the mortgagees; and he further found that by his report of the 11th of December 1826, not having the said exception and orders particularly brought to his consideration, he certified that John Morgan received several sums of money, amounting together to 13,000 *l.*, as agent for Sir Watkin Lewes; and which now, having regard to the said exception and orders, he found to be incorrect, and instead thereof he found that he received only 9,209 *l.* 7 *s.* 1 *d.*, viz., 4,209 *l.* 7 *s.* 1 *d.* of Farrer and James Morgan, being the consideration for the mortgage of 6,610 *l.*, 4,000 *l.* of Wilder, being the consideration for the mortgage of 4,000 *l.*; and 1,000 *l.* of Chardin Morgan on an assignment of the benefit of a decree in the cause *Lewes v. Popkin*. And he certified that having found by his former report that John Morgan had paid to or on account of Sir Watkin 13,000 *l.*, which included 2,400 *l.* for the bond dated February 1775, and 31 *l.* 19 *s.* 5 *d.* interest thereon, making together 2,431 *l.* 19 *s.* 5 *d.*; but the validity of that bond being questioned, and the allowance of these two sums being objected to, without sufficient evidence of the consideration of the bond, he had, having regard to the said exception and orders, required the Appellant F. Morgan, who, as executor of John Morgan, claimed

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the benefit of the bond, to prove the consideration thereof, but he declined to produce any new evidence, relying on the report made on the 11th of December 1826, and on the evidence then produced, viz., an account, dated 24th of February 1777, signed by Sir Watkin Lewes (i), and the affidavit of John Morgan, sworn on the 12th of February 1819; and the Respondents Evans, Jenkins and Hurd having produced before him the separate reports made by the Deputy Remembrancer on the 15th of July 1802, the 10th of May 1808, the 13th June 1809, and the 25th of June 1811, together with the order of Court made on the 5th of July 1813, and the orders of the House of Lords, made on the 8th of April 1816, and the 5th of July 1825, he had taken the same into his consideration, as explanatory of the first exception to the fifth separate report of the Deputy Remembrancer, and the said orders of Court and of the House of Lords, and had thereupon disallowed the said sum of 2,431*l.* 19*s.* 5*d.*, but he allowed, in lieu thereof, several payments appearing, by the separate report of the 25th of June 1811, to have been made by John Morgan, to and for the use of Sir Watkin Lewes, amounting together to 1,315*l.* 10*s.*, which payments John Morgan had treated as satisfied by the bond for 2,400*l.*; and the said sum of 1,315*l.* 10*s.* being less than 2,431*l.* 19*s.* 5*d.* by 1,116*l.* 9*s.* 5*d.*, he had deducted the last-mentioned sum from the 13,000*l.*, leaving the sum of 11,883*l.* 10*s.* 7*d.*, which, having regard to the said exception and orders, he found to be the correct total amount of the several sums of money paid or applied by John Morgan to the account of Sir Watkin Lewes, and from which sum of 11,883*l.* 10*s.* 7*d.* being deducted the aforesaid sum of 9,209*l.* 7*s.* 1*d.* received by John Morgan, there remained 2,674*l.* 3*s.* 6*d.* due

(i) Vide *supra*, p. 166.

to John Morgan on balance of such receipts and payments. He therefore found that the said exception and orders ought to vary the balance stated in his former report; and in order to ascertain how far the same ought to be varied, he had taken an account, in which he charged F. Morgan, as executor of John Morgan, with the said sum of 999*l.* 7*s.* 10*d.*, and the monies appearing by his former report to have been received by John Morgan and Francis and James Morgan subsequently to the 3d of September 1804, for rents and profits of the estates, amounting in the whole to 17,097*l.* 9*s.* 2*d.*, and he had allowed to F. Morgan the aforesaid sum of 2,674*l.* 3*s.* 6*d.* balance in favour of John Morgan, and the other monies appearing by his said report to be remaining due from the estates of the said Sir Watkin Lewes, exclusive of the mortgage monies, amounting in the whole to the sum of 7,835*l.* 4*s.* 4*d.*, of which sum he found that the 1,794*l.* 19*s.* 6*d.* balance of taxed costs was the only sum which carried interest; and in taking the accounts he had made half-yearly rests, as directed by the order of the 11th of July 1810, and applied the overplus of the rents and profits, after keeping down the interest on the said sum of 1,794*l.* 19*s.* 5*d.*, in reduction of all the said principal monies, so long as any part of such principal monies remained unpaid; and he found that, instead of there being a balance of 3,597*l.* 1*s.* 10*d.* due from the estate of Sir Watkin Lewes at the date of his former report, as therein stated, there was then due to that estate from F. Morgan, as executor of John Morgan, 6,534*l.* 7*s.* 7*d.* And he further certified, that Francis and James Morgan had, since the date of his former report, received under the mortgage assignment of the decree in *Lewis v. Popkin*, 1,000*l.* and

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300*l.*, which sums formed part of the judgment for 1,547*l.* 19*s.*, one of the securities mentioned in the former reports, and that 247*l.* 19*s.* only remained due on that security ; and also that they had received 300*l.* of rents and profits of Sir Watkin Lewes' estates ; he therefore found that the said balance of 6,534*l.* 7*s.* 7*d.* ought to be further varied in respect of these sums received since the former report. And he found that the balance due from F. Morgan, as executor of John Morgan, to the estate of Sir Watkin Lewes, amounted to the sum of 8,227*l.* 10*s.* 2*d.*

To this report also the Appellant took exceptions, all which were over-ruled by the Lord Chief Baron, with costs, by an order dated the 12th of May 1829, which is the third order now appealed from.

The cause was heard, on further directions, before the Lord Chief Baron, and by an order dated the 6th of July 1829 (which is the fourth order under appeal), it was ordered and decreed, that the Master's last report be confirmed, except as hereinafter mentioned, and that F. Morgan, as personal representative of John Morgan, was entitled as against Sir Watkin Lewes' estate to be allowed in account interest at 5*l.* per cent. from the 28th February 1775, being the date of the bond for 2,400*l.*, upon the principal sum of 1,315*l.* 10*s.*, to any amount not exceeding, with the said principal, the sum of 4,800*l.*, the penalty of the bond. And it was accordingly ordered, that the Master should review his last report, by allowing John Morgan's representative interest upon that sum of 1,315*l.* 10*s.*, at 5*l.* per cent., from February 1775 up to the time when the same should have been paid off and satisfied, the said principal sum and interest not to exceed the penalty of the said bond, and that in reviewing his report, he should, after satisfaction of the mortgage debts, due from the estate of Sir Watkin

Lewes, apply the rents of the mortgaged estates in satisfaction of the judgments, before he should apply the same in satisfaction of the principal sum of 1,315*l.* 10*s.* and interest thereon, but without disturbing the application of such rents in the payments of the bills of costs and interest thereon. It was further ordered that the Master should inquire, having regard to the above directions, when the debt due from Sir Watkin Lewes' estate to John Morgan's estate was satisfied, and what balance, if any, was due to the former from the latter on the day when such debt was satisfied, and that he should compute interest at 4*l.* per cent. upon the balance, if any, which he should so find, from the day upon which the debt due from Sir Watkin's estate to John Morgan's estate, was satisfied, and also upon the monies which, since that day, had been received by John Morgan's representative, or the mortgagees or their representatives, out of the estate of Sir Watkin; and that he should add the amount of such interest to the aforesaid balances, if any, and monies since received, and that he should report how much remained due for principal and interest from the estate of John Morgan to the estate of Sir Watkin Lewes, upon the footing of the aforesaid declarations and directions. And it was declared that in the taxation of the costs in every proceeding in which the costs were not costs in the cause, the Master should allow no other costs than such as had been given by the order made in such proceeding, or were due by the general rules of the Court, and that where no costs were given by special order, or by the said rules, that he should not allow costs on either side; and that he should tax and apportion all parties (except the defendants Evans, Jenkins and Hurd,) their respective costs, so far as the suit was to redeem the mortgaged premises; and that he should tax and

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apportion the costs of all the parties, (except the costs of John and James Morgan and their respective representatives,) so far as the same had been occasioned by the controversy respecting the amount of the several mortgages and of the general balance due to or from Sir Watkin Lewes or his estate; and that he should deduct the amount of the costs of John Morgan, and of F. Morgan as his representative, so far as the suit was to redeem the mortgaged premises, from the balance which he should find to be due from the estate of John Morgan to the estate of Sir Watkin Lewes; and should tax Joan Wilder and Sir Watkin Lewes, and Evans, Jenkins and Hurd, their respective costs, so far as the same had been occasioned by the controversy respecting the amount of the several mortgages, and of the general balance due to or from the said Sir Watkin Lewes or his estate, and that F. Morgan, as executor of John Morgan, should pay Evans, Jenkins and Hurd their respective costs occasioned by the said controversy; and that he should add the amount of Sir Watkin Lewes' and of Joan Wilder's costs relating to the said controversy and amount of the general balance, when taxed, to the sum which he should find to be due from the estate of John Morgan to the estate of Sir Watkin Lewes for principal monies and interest, according to the directions before given. And it was further ordered that F. Morgan, as personal representative of John Morgan, should pay the amount of the said principal monies and interest, and last-mentioned costs; and that F. Morgan, Mary Ann Morgan, Joan Wilder, and all other necessary parties, should, according to their respective interests, reconvey unto Herbert Evans the mortgaged estates, free from incumbrances (i).

(i) See 3 Younge & J. pp. 230 and 394, for the proceedings in

Francis Morgan appealed to the House of Lords from the orders or decrees of the 4th of February 1827, the 3d May 1827, the 12th May 1829, and the 6th July 1829.

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Herbert Evans also presented his cross-appeal against so much of the order of 6th July 1829, as declared that F. Morgan, as representative of John Morgan, was entitled to interest from the date of the bond for 2,400 *l.* upon the principal sum of 1,315 *l.* 10 *s.*, and as ordered the Master to review his report, by allowing John Morgan's representative interest upon that sum from the 28th of February 1775, up to the time when the same should have been satisfied; and also from so much of that order as ordered the Master, after satisfaction of the mortgaged debts, to apply the rents of the mortgaged estates towards payment of the judgments, before he should apply the same towards payment of the said principal sum of 1,315 *l.* 10 *s.* and interest thereon, and as ordered that it should be referred to the Master to inquire and report, having regard to the above directions, when the debt due from Sir Watkin Lewes or his estate, to John Morgan or his estate, was paid, and what, if any, balance was due to the estate of Sir Watkin from John Morgan or his estate, on the day when such debt was paid, &c.

When these appeals came to be heard, the counsel on both sides adopted the suggestion of the Lord Chancellor, that it would be more convenient to argue both appeals together: but they submitted that three counsel at a side ought to be heard, on account of the length and complex nature of

the cause from the first general report in 1827. The Lord Chief Baron prefaces his judgment, p. 236, with a summary account of the suit from its commencement.

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the case, involving several most important questions.

The *Lord Chancellor* (Lord *Brougham*) said it was the rule of the House not to hear more than two counsel at a side in any appeal, except one of an unusual description, and even then with leave of the House. There was here an appeal and cross-appeal; the parties to one were the parties to the other, and the counsel were the same in both appeals; in reality there was only one appeal.

Sir *Edward Sugden* and Mr. *Pemberton* argued the case for the Appellant, F. Morgan: (Mr. *Lowndes* was with them):—

This Appellant was entitled to the allowance of interest on the judgments recovered by Chardin Morgan and John Morgan, mentioned in the Master's first general report, as well by the express terms of the order of the 11th July 1810,—which, by the order of this House of the 5th of July 1825, was incorporated with the decree of 1796, as the basis of the report to be made,—as from the nature of the debts for which the judgments were recovered, and from the nature of the dealings and transactions between Sir Watkin Lewes and the defendants in the suit; *Godfrey v. Watson*(*k*), *M<sup>c</sup>Clure v. Dunkin* (*l*), *Bann v. Dalzell*(*m*), *Tunstall v. Trappes*(*n*), *Loftus v. Swift*(*o*), The Appellant, by his exceptions to that report, insisted that the Master was bound, in taking the accounts, to allow interest on the principal monies due upon the judgments. The order of the Lord Chief Baron, overruling the exceptions with costs, was clearly erroneous.

(*k*) 3 Atk. 517.      (*l*) 1 East. 436.      (*m*) Moo. & M. 228.  
 (*n*) 3 Sim. 299.      (*o*) 2 Sch. & Lef. 642.

The next order of the Court below, questioned in this appeal, was the order of the 3d of May 1827, directing the Master to review his report, dated the 11th December 1826, and which was pronounced without any objections having been brought in before the Master, or exceptions having been taken by any of the Respondents to that report,—forms which, by the practice of the Court, were necessary before the report could be varied or impeached. The only exceptions to that report were those taken by the Appellant; they were over-ruled, and the Lord Chief Baron, on the mere suggestion of the Respondent's counsel, sent back the report to be reviewed, a proceeding quite unheard of in practice.

By that order and by the two succeeding orders, which are also the subject of appeal, namely, the order of the 12th May 1829, over-ruling this Appellant's exceptions to the Master's report of the 10th of December 1828, and the order of the 6th of July 1829, on further directions, the findings of the Deputy Remembrancer in his separate reports, under the order of 20th of June 1801, are taken as having concluded the question of the amount of the monies advanced to Sir Watkin Lewes on mortgage, and the total amount is fixed at the sum of 8,209*l.* 7*s.* 1*d.*, because so stated in the reports of the Deputy Remembrancer, and the subsequent accounts of interest and of the receipts of the Appellant and of those whom he represents are taken on that basis. But the findings of the Deputy Remembrancer had not in fact concluded or finally ascertained the amount of the mortgage monies, and his proceedings and inquiries under the order of the 20th of June 1801, ought not to have been substituted for the inquiries directed by the decree of the 2d of July 1796.

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The report of the Master on the 11th of December 1826 was correct in all respects but those to which this Appellant objected by his exceptions, and was in conformity with the evidence produced by him to the Master, and in obedience to and in pursuance of the order of this House of the 5th of July 1825.

The whole amount of the sums in the several mortgages, stated to have been advanced to Sir Watkin Lewes, had really and truly been advanced to him or for his use, and the sums were all advanced on the security of those mortgages, and ought therefore to be allowed to this Appellant with interest, and the mortgaged estates ought to stand as a security for the principal and interest. By the mode in which the accounts against the Appellant were directed, the estate of John Morgan was charged with interest upon rents received by him at the time when he was in advance for the mortgagor, and, on the other hand, no interest upon such advances was allowed to him.

The costs of this suit, it being a suit to redeem a mortgage, ought all to be borne by the mortgagor, especially as the mortgagor has by his bill made various charges of fraud, none of which has been substantiated.

Mr. *Tinney* and Mr. *Knight* for Herbert Evans and the other Respondents: (Mr. *West* was with them):—

The decretal order of the 4th of February 1827, over-ruling the Appellant's exceptions to the report of the 11th of December 1826, was well founded. It is a general rule, both at law and in equity, that judgments do not carry interest, except where there are some special circumstances; *Clarke v. Scton*, (p).

(p) 6 Ves. 411.

There were no special circumstances in this cause to vary the general rule (*q*). The order of the 3d of May 1827, was right, because if that order had not been made, the Master's report, finding that the mortgage monies received by John Morgan amounted to the sum of 13,000*l.*, would have been in direct contradiction to the order of this House of the 8th of April 1816, to the Deputy Remembrancer's fifth separate report, to the order of the Court of Exchequer of the 8th of November 1817, and to the order of this House of the 5th of July 1825, by all which it was found and declared that 8,209*l.* 7*s.* 1*d.* constituted the total amount of the mortgage monies received by John Morgan as agent to Sir Watkin Lewes, and consequently there would have been proceedings on the same record totally inconsistent with each other.

The order of the 12th of May 1829 over-ruling the exceptions taken by the Appellant to the Master's report of the 10th of December 1828, was right and necessary. It became necessary to over-rule the first exception; it was in effect an exception to the Deputy Remembrancer's fifth separate report, which had been confirmed by an order of the Court of Exchequer of the 8th of November 1817, and subsequently by the order of this House of the 5th of July 1825. The Court of Exchequer was imperatively called on to make that orders a to the second, third, fourth and fifth exceptions thereby over-ruled, because the Master, by his report of December 1826, had found that the mortgage monies received by John Morgan, amounted to the sum of 13,000*l.*, in which sum was included the bond for 2,400*l.* But by the orders and exception, to which the Master was directed to have

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(*q*) See Mr. Baron Graham's observations, 5 Price, 151.

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regard on reviewing his report, it appeared that the mortgage monies received by John Morgan, only amounted to the sum of 8,209*l.* 7*s.* 1*d.*, in which sum was not included the bond for 2,400*l.* The bond for 2,400*l.* therefore became an item for the Appellant to prove against Sir Watkin Lewes's estate on the general account. It was impossible that the Master could receive the bond itself and the settled accounts as evidence of the debt on the general account, when the 2,400*l.* had been excluded from the mortgage account both by this House and the Court of Exchequer, on the ground that, as between attorney and client, the bond itself and the settled accounts were not evidence of the debt which the instruments mentioned.

*The Lord Chancellor* :—We have now come to the close of this long, dry and infinitely tiresome, though not unimportant case. All the counsel who argued it, both in this House and in the Court below, have felt completely tired of it, as a case of more than ordinary dryness. We must all feel great satisfaction that we are at length approaching the end of this long litigation. The cause was in Court before most of us were born; it has rolled on for half a century in the way of orders of the Court below, of appeals to this House, and of remitter to the Court, all owing to the unfortunate order of June 1801, which gave rise to five separate consecutive reports, and which was itself a manifest departure from the fundamental decree, and which gave rise to a series of conflicting decisions. This same view of that order had also struck the mind of the late Lord Redesdale, as appears from his observations in one of the appeals to this House. Let us hope that we have now come to the last stage of

the case; and I shall be sorry if the judgment which I shall, after further consideration, advise your Lordships to give, will lead to anything else than a final decision. I should rejoice very much if I could recommend to your Lordships to take the same view of the case that the Court below did in the judgment appealed from, which certainly was a most elaborate judgment. I should rejoice if I could come to the same conclusion to which Chief Baron Sir William Alexander came in that judgment (r). But when I have before me the order of 1801, made by the Court of Exchequer, it is possible, I think, that we may come to a different conclusion from that Court, without doing any great violence to the principles of the Court, or the due course of justice.

I am not now about to give a final opinion on any part of the case, but I am about to state to your Lordships, in the presence of the learned counsel, the points which I desire particularly to consider. There are three main points in the case, independent of the question of costs. The first point is that which regards the bond to secure 2,400 £; I fear I cannot, on that point, recommend to your Lordships to come to the same conclusion as the Court below did. The evidence on that point was so little dealt with in the Court below that it might as well not to have been before that court at all. The next point relates to the apparent discrepancy between the answer and the affidavit of Mr. John Morgan, and the refusal of Sir Watkin Lewes to state his case by any affidavit at all, which refusal may go far towards proving that, to say the least, he was distrustful of his own case. That refusal, however, did not set up the affidavit of

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(r) 3 Y. & J., 236 and 395.



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Mr. John Morgan as conclusive of his statement, but it is competent for us to consider that there was an affidavit on one side, not attempted to be contradicted on the other; it is with a view to compare the affidavit and answer of Mr. Morgan, and note the discrepancy between them, if there be any discrepancy, and to observe on the want of an affidavit on behalf of Sir Watkin Lewes, that I am desirous to take more time to look into the papers upon this point.

The third point, which I shall have particularly to consider, is, whether interest ought to be allowed on the judgments, in respect to the defeasance in the warrants of attorney for entering up the judgments, and whether or not that defeasance was before the Court below (*s*); but there are other grounds also on which I am inclined to think it will be necessary for us to differ from the judgment of the Court, and which I will state more fully when your Lordships come to pronounce the judgment of the House.

The further consideration of the case adjourned.

June 14.

The *Lord Chancellor*:—My Lords, when the argument in this very important, but very complicated case, was closed at your Lordships' bar, I took occasion to

(*s*) The defeasance on the warrant of attorney to confess judgment for 2,000*l.* at the suit of John Morgan was this: "The within warrant of attorney is given for securing the sum of 1,142*l.* together with lawful interest for the same. And it is hereby agreed and understood that no execution shall issue on the judgment to be signed by virtue thereof, provided the said sum of 1,142*l.*, and interest as aforesaid, are paid on or before the 6th day of November next ensuing the date of the said warrant of attorney, and that the same shall not exclude the within named Sir Watkin Lewes from any equity he may have touching the said sum above mentioned.

state the views with which I was then impressed with respect to the most material points submitted for your consideration, three in number, upon which I felt great difficulty in arriving at the same conclusion to which the Court below had come. I then advised your Lordships, for reasons which I stated, especially with a view of comparing the answer of John Morgan with his affidavit in the cause, and with a view of examining how far the question of interest on the judgments had been well dealt with in the Court below, and finally, with a view of considering the question of practice in the courts of equity, raised by the course which the Court below had taken, of referring back to the Master to review a report, to which no objections were made before the Master, and against which no exceptions were taken before the Court; chiefly with those views, I advised your Lordships to delay the further consideration of this cause. I have availed myself of the opportunity which this postponement has afforded for further examination, and I am prepared to state to your Lordships the result of the attention which I have been enabled to give to these questions; that result is, that all the difficulties which I before had in coming to the conclusion at which the Court of Exchequer had arrived, remain unabated, and that I am rather more, than less, prepared to express an opinion contrary to the judgment of that Court than I was when I last addressed your Lordships.

If, on the one hand, it is matter of anxious desire that there should be a coincidence of opinion in the Courts, and if I naturally felt a great reluctance in being called upon to advise a reversal of the decree of the Court below to so large an extent as I am about to propose; it is at the same time, on the other hand,

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a great consolation to my mind that I have with me, I think, in some degree, the authority of opinions expressed in your Lordships' House, when the case was formerly here, and that I have with me, on a most material point, the opinion of a most acute, intelligent and learned Judge in one important stage of the proceedings in the Court below, I mean the late Mr. Baron Wood. But further, I do not hesitate to say, that some of the matters involved in this decree are so extremely clear, and the error which has prevailed below is, to my apprehension, so manifest, that I feel far less reluctance than I might otherwise labour under, in recommending to your Lordships the course which I feel it my duty to propose. I shall briefly advert to the several principal parts of the case.

In 1801, by a most unfortunate order made by the Court below, but with which the present Appellant is no way chargeable, for he resisted it, an entire departure was effected from the course which had been taken in the cause in 1796. The result of that has been to involve the whole cause, for 33 years, in a degree of inconsistency, obscurity, doubt and complexity, which I do not think I exaggerate at all when I pronounce to be without precedent or parallel.

The first point to which I wish to call your Lordships' attention is as to the effect of Mr. John Morgan's affidavit, which is a most important branch of the case; as to that affidavit I remain of the opinion which I before expressed. A question here arises, extending generally to a sum of 500 *l.*, and also to other sums, all included in a larger sum of 2,400 *l.*, formed of consolidated items, said to be composed of the aggregate amount of various bonds and monies due from Sir Watkin Lewes to Mr. Morgan, as having been advanced by him in money, or in money's worth, and which

originally having consisted of different minor sums, were consolidated ultimately into one sum, secured by a bond for 2,400*l*. I agree entirely with that which Mr. Baron Wood has, in his able judgment, reported in the fifth volume of Mr. Price's Reports, admitted, and which no one can doubt, namely, that when a person claiming to be a creditor of another stood, at the time when the money was said to have been advanced, in the relation of solicitor or attorney to the borrower as his client,—Mr. Morgan was Sir Watkin Lewes's attorney,—it would not be sufficient for him, in order thoroughly to substantiate his claim against his client, merely to produce the instrument of security, even though the security be a bond ; he must go further. Now, the question on this point of the case is, whether, taking the whole facts of the case together, Mr. John Morgan has not gone further, and whether he has not gone sufficiently far to have justified the Master in coming to the conclusion to which he came in the first report,—the general report, made the subject of exceptions when the decree of the 6th of July 1829, which is appealed from, was pronounced. I agree with the affirmative of that proposition ; I hold that the affidavit of John Morgan was not only admissible, but I am further of opinion, that whether we take the circumstances in which it was made, whether we consider the position in which Sir Watkin Lewes had voluntarily placed himself, whether we consider his refusal to avail himself of the opportunity given of telling his own story on oath, or go back to the order of the 13th of November 1818, under which that affidavit was let in, or whether we go back the whole length of the proceedings, and consider the manner in which Sir Watkin had proceeded, and the manner in which he had failed, even

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to attempt to offer evidence in support of the allegations of the bill; that, in all those views, and upon all those grounds, it was not only competent to the Master to take into his account the affidavit of Mr. John Morgan, which, it is not denied, was admitted by force of the order I have last adverted to, but that he was bound to give it great weight; that it was not only admissible, but entitled to the greatest credit; and I think I shall demonstrate to your Lordships that it was in the circumstances all but conclusive of that to which John Morgan swore.

First, a bill was filed against Mr. Morgan; charge upon charge was heaped upon him in that bill; there was hardly a security he had that was not impeached; there was hardly a fraud that could be committed which he was not charged with; there was hardly an accusation that could be made that was not urged against him; and, among other things, many transactions were impeached which now stand undisputed, and the decree establishing which is not appealed against. But I dwell not much upon this topic, though it carries me one step towards my conclusion. To support a bill so framed, seeking to cut down the securities of a creditor, and reflecting materially on the character and conduct of a professional man, not a tittle of evidence was adduced by the plaintiff, nay, not even an attempt was made to establish such a case; while the answer of Mr. Morgan, more or less, strenuously denied the charges, and set up his own case. Then came the affidavit of Mr. Morgan. How does that get into Court? It is easy to say that a man's own oath shall not avail him; that a man shall not decide the cause by his own affidavit, made on his own behalf; it is easy to say a party is no witness for himself. True; but, at all events, there is the oath

of Mr. Morgan against the unsworn allegation of Sir Watkin Lewes in his bill. But, moreover, admitting Mr. Morgan to be a solicitor, and to have acted as a solicitor of the plaintiff; admitting that he is liable to the rules governing solicitors in their dealings with their clients, and the bare production of that, which would be sufficient ground for a judgment in other cases, namely, the instrument constituting his security, is not here sufficient; admitting both the fact and the doctrine of the Court, let us look at the peculiar nature of this affidavit, and the circumstances in which it was allowed to be made use of.

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The order to which I have adverted of the 13th of November 1818, is a substitute for an order *nisi* of the 25th of June 1818, calling upon Sir Watkin Lewes to show cause why the state of facts of John Morgan should not be taken as confessed by Sir Watkin Lewes. The reason which induced the Court to make that order of the 25th of June 1818, was, that there was no possibility of getting Sir Watkin Lewes to answer the interrogatories which had been filed. Mr. Morgan had exhibited his interrogatories in the accustomed manner of the Court, but no power on earth could extract an answer from Sir Watkin Lewes. When the Court found that they could not attain that, which Mr. Morgan was entitled to, namely the examination of the plaintiff on oath, they were then induced to make the order of June 1818, calling upon him to show cause why the statement of Mr. Morgan should not be taken *pro confesso*. This was found to be irregular; it was an order which the Court found, on further consideration, it could not abide by, and being an order *nisi*, on cause being shown it was discharged, but discharged for the purpose of substituting the order of the 13th of November

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in its place. Now let us attend to that order, for it is a most material step in the cause. After discharging the order of the 25th of June, ' it is ordered that in case the said plaintiff should make default in filing his examination to the interrogatories exhibited by the said defendant John Morgan before the Deputy Remembrancer, for his examination, by the first day of the then next Hilary term," (giving him, your Lordships perceive, more than two months, from the 13th of November to the 23d of January, after all the defaults he had already made,) " the said John Morgan should be at liberty to make an affidavit of the several facts to which the said interrogatories so exhibited by him for the said plaintiff's examination were intended to apply, which affidavit the said Deputy Remembrancer was then to take into his consideration." This order, therefore, gave the defendant leave to make his own statement, on oath, of his own case, and the Deputy Remembrancer was to take that statement into his consideration in the further proceedings in the cause, provided Sir Watkin Lewes contumaciously persevered in refusing to answer the interrogatories which Mr. Morgan had filed against him.

The Chief Baron, in his judgment, relied, I think, too much upon the consideration that this affidavit of Mr. Morgan was only to be receivable in evidence, and was not ordered to be binding upon the Remembrancer. I agree in that opinion. But though the exigency of the order did not require that it should be binding upon the Remembrancer, I am about to show that the circumstances in which the order was made, and still more, in which the affidavit was made and filed under that order, were such as to make it, in all reason and upon all principle, the bounden duty of the Remembrancer and of the Court, when the report should

come before it as a matter calling for ultimate decision, to give the greatest, I had almost said the most implicit, credit to the affidavit of John Morgan. Sir Watkin Lewes was to have about ten weeks to repent of the course he had taken, to abandon his contumacious refusal to answer, and to put in his examination. He did no such thing. With a power of answering he chose to be silent; with liberty given to him to tell his own tale on oath, he chose to abandon that privilege; with facilities afforded him, which, above all others, no honest party, conscious that he had nothing to conceal, and satisfied that his case was a sound one, would have coveted, namely, the liberty of telling his own story, and making it evidence for himself, he rejected the proffered boon, repudiated the privilege given him and remained as silent as before. This he did with this alternative levelled at him by the order of the 13th of November, 1818, that if he did not answer upon his oath, not merely he should lose the opportunity which other litigants consider of great advantage, namely, of having his own affidavit, in answer to the interrogatories, taken as a portion of the evidence in the cause, but his adversary, John Morgan, should be allowed to come in with his affidavit, and to tell his story upon his oath; yet still he would not swear. This to my mind is conclusive.

It has been suggested on behalf of Sir Watkin Lewes, that he was not a man of good judgment, or clear understanding; but he had a keen sense of his own interests; he knew his own affairs; he was well educated, intelligent, and acute; he was a barrister of some standing before he quitted the bar; a man engaged in business all his life; a man of litigious habits, who scarcely ever allowed a day to pass, when a motion could be made for or against him in the

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course of his cause, without attending it himself in person. To say that he was not aware of the consequences of his not complying with the former orders; and answering his adversary's interrogatories, is unreasonable; to pretend that he was not aware of the necessary effect of the order of the 13th of November, 1818, and that the consequence was not present to his mind as of necessity following, namely, that Mr. Morgan's affidavit would be let into the cause in default of his answering, is vain and fanciful. No one acts without some reason in important matters; no one acts without some motive. Can man's imagination conceive any but one reason, any but one motive, which could seal the lips of Sir Watkin Lewes, after the order of the 13th of November 1818, and prevent his adopting the favourable alternative when the Court gave him his choice of answering the interrogatories? One, and but one, reason can any man's imagination devise for such conduct, consistently with the belief of Sir Watkin being a person of sound mind, namely, that he knew that, if he were to answer the interrogatories upon his oath, and to answer truly, he must tell a story more unfavourable to himself than any which John Morgan would tell. I do not stop short of that conclusion, that he was aware that nothing which Morgan would truly swear against him would be worse for him than that which he himself, if he told the truth, must swear in answer to Morgan's interrogatories; I go further, and infer that it would be more to his prejudice to tell the story himself than to have the story told, which he expected to proceed from Morgan. It was this among other reasons which prevented Sir Watkin Lewes from swearing; there is no other way of explaining his refusal to answer, and his embracing the alterna-

tive of accepting the case made by his adversary's evidence.

From this conclusion, what inference can be drawn but that, in effect, Sir Watkin Lewes's affidavit is before us. It may be called John Morgan's, but it appears to me that in truth it is Sir Watkin Lewes's, for he had the opportunity of telling his own story, and was warned that if he did not, his adversary should be heard to tell his; when, therefore, he embraces the alternative of silence, and prefers his adversary being heard, he, in effect, gives credit to that story; *dum tacet, loquitur*, and the affidavit, by acquiescence, may be considered as his own; it may be called the affidavit of John Morgan, but it is in reality the statement of Sir Watkin Lewes. This, then, is the common case of a party swearing against another, that other having the opportunity of answering and abandoning that opportunity, and allowing the affidavit of his adversary to stand against him; and it is every day's practice, in all the Courts on both sides of Westminster Hall, in such a case, to hold the party that does not answer, as confessing that he has no answer to make to his adversary's statement, and as clothing his adversary's statement with a full and conclusive authority against him.

Those are the grounds upon which I hold that the affidavit of John Morgan, admitted under the order of the 13th of November 1818, is not only competent, but almost conclusive evidence of the fact of the advance of the money which he therein sets forth. He produces also the instrument in confirmation of his statement, the instrument being not sufficient of itself only, because he stands in the relation of a solicitor to a client; but then the instrument is corroborative of the affidavit. This view, which I have now

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taken, disposes of a large portion of the case ; it disposes of those exceptions which were taken by the Appellant to the Master's second report, and which were over-ruled by the Court below ; I mean the report of the 10th of December 1828, by which the Master disallowed the sum of 2,400 *l.* and allowed in lieu of it 1,350 $\frac{1}{2}$ . I shall enter into the details of that report when I come to the particular alterations which I think ought to be made in the decree made on further directions.

I proceed now to observe upon other questions raised by the consideration of that report of the 10th of December 1828. One objection I have to that report is a material one, but I know not whether, in point of regularity, I should not object to the whole of it ; for I have great doubt, and much more than doubt, of the propriety of the order which was made on the 3d of May 1827, referring back to the Master to review the report which had been made on the 11th of December 1826 ; I have a strong opinion against the fitness and regularity of that order, referring back the report ; if it ought not to have been referred back, that would put an end to the report of the 10th of December 1828, which was founded upon the reference. The former report was reviewed in consequence of that order ; it was altered and re-constructed on principles dictated by that order, the erroneous order, in my opinion, of the 3d of May 1827. I shall proceed to state the grounds on which I differ from the Court below, as to that order.

With respect to the report of the 11th of December 1826, the more I consider it the less objection I am disposed to make to it, whether in reference to the evidence in the whole case, or its alleged consistency, on the one hand, or the discrepancy set up, upon the

other, with the previous orders of your Lordships' House. I do not decline to think that it materially differs from those orders; I am quite certain, that with those orders, the report of December 1828, which was, as it were, forced upon the Master by the order of the 3d of May 1827, cannot so well stand as can the report of December 1826. But it is not necessary, in the view I have taken, to go much at large into that question; for I am of opinion, that it was irregular in the Court, and contrary to the rules of practice, to send back to the Master the report of the 11th of December 1826. No exceptions had been taken by the Respondents, nor had any previous objections ever been brought in before the Master to that report; it was sent back to the Master as upon disapproval of the report itself by the Court, and a further inquiry was directed by an order made the 3d of May 1827, upon a hearing for further directions. Now, generally speaking, that cannot be done; the practice of the Court prohibits it, wisely and upon solid grounds. The Master ought not to be surprised by the exceptions, without notice being given him by way of objections. I take the rule, as fixed, to be that you cannot except to the Master's report without first taking objections before the Master. If it should so happen that a party is taken by surprise when he means to except, and if from accident, or any contrivance, or through excusable neglect, he has been deprived of the opportunity of regularly taking in his objections to the report, he may file an affidavit showing the circumstances, explaining in what the surprise consists and tracing it to its source. If he shows that he has been surprised by the sudden signing of the Master's report, or anything which precluded him from the opportunity of taking in his objections, on satisfying

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the Court of that, by affidavit of the fact, he may have special leave of the Court to file exceptions, without having previously taken in objections before the Master; that is the practice of the Court, and from that practice the order of the 3d of May 1827 was a departure.

But this is not all. There is a general order of Court of the 20th of July 1793, which prohibits exceptions from being received to a report, except on the signature and certificate of counsel that he has examined them and thinks them well founded; and, moreover, there is a deposit, being half the amount of what is deposited in the case of an appeal, which is 20 *l.*, as a security for costs to the other party, in case the exceptions are over-ruled. It is not mere matter of form but of substance, that parties should not be allowed to pass by all those regulations; that in the first instance objections should be taken, so that the Master may reconsider the matter referred to him and make a right report, instead of one open to exception; otherwise needless litigation would be occasioned in the Court when the report might have been set right in the Master's office. In the next place, there is the security to the other party that he shall have the certificate of counsel, and to the Court that its time shall not be needlessly occupied; and there is also the security by the deposit. But if parties, without making objections to the report, while still before the Master, without security against frivolous objections, by the deposit and signature of counsel, shall be permitted, on the hearing for further directions, to raise exceptions and to have the whole matter referred back to the Master on those exceptions so taken, it is clear that all the regulations which have been made for the benefit of the Court and the suitors,

to save time and to avoid unnecessary litigation and expense, are all useless.

Cases were referred to, in which it is said that the Court will upon further directions alter the Master's report. I do not deny that there are authorities to that effect. But I hold that the only case in which the Court will upon further directions disallow a report, is, where there is error in law appearing on the face of the report, which would be a blot upon the proceedings of the Court, in which case the Court will set that error right, upon a hearing for further directions. In *Adams v. Claxton* (*k*), Sir William Grant says, "No exception is taken to the report, but the whole matter appears on the face of it, and therefore it is contended that it is open to inquire whether the Master's conclusion is right, and I apprehend it is so open;" and he inclined to the consideration of the matter, and came to a different conclusion from that to which the Master had come in his report. But how can the Court apply this practice to other cases, except by taking the proposition negatively, and laying down that, though the error does not appear on the face of the report, there may still be exceptions regularly and formally taken? But that is contrary to the case of *Brodie v. Barry* (*l*), where it is said that, "on a petition to confirm a report, and praying consequential directions, a party cannot, without presenting a counter petition, show cause against the confirmation, except upon grounds appearing on the face of the report." In the present case no error appeared on the face of the report; but still it was referred back to the Master to enter into a new inquiry. I hold that it was erroneously referred

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back, and so far that the order of the 3d of May 1827 was wrong.

But even if the report had been regularly referred back, even if we had a right to listen to the contention on the part of the Respondents, if leave had been asked, and the Court had given them leave to file exceptions without that previous procedure of carrying in objections before the Master,—which I hold to be matter of substance as well as form,—it appears to me that this order of the 3d of May 1827 could not be correct; that it would have been erroneous to have referred back the report on the ground taken by the Chief Baron, namely, that that report could not stand, though not excepted to, because a judgment of the House of Lords was set at nought by it, the report being contrary to an order of the House. I have showed that it was not contrary to the order of the House, and that therefore on that ground the order of May 1827 was not warranted. I have thought it fit to address myself thus particularly to this part of the case, because it has been a good deal argued at your Lordships' bar, but I knew not that it was necessary to the alteration which I am about to propose in the decree.

I now come to the third question, that which relates to interest not being allowed on the judgments. That, generally speaking, judgments do not carry interest, either at law or in equity, is admitted, unless there be something special in the dealing of the parties, or some agreement between them, or some other order made in the particular case to take it out of the general rule. I find that in this case there is a peculiarity and special matter quite sufficient for the purpose. In the first place, the warrant of attorney,

with the memorandum indorsed, on which judgment was entered up in Trinity term 1778, specified in the defeasance, that the within warrant of attorney was to secure the sum of 1,142 *l.*, together with the lawful interest for the same. Now if that warrant is in the cause *cadit questio*; but supposing that it is out of the cause—a reference to it was much objected to on the argument, and I did not feel satisfied that I was entitled to import it into the cause—but supposing we leave it out entirely, I am still of opinion that interest should be allowed upon this judgment. First of all, nothing can be more harsh or less equitable than that the monies which John Morgan received, the rents of Sir Watkin Lewes, of which he had perception, should be all charged with interest against him, and in favour of Sir Watkin, and yet that the monies which he advanced for Sir Watkin, and for securing which he had recovered judgments, should bear no interest. In the next place, can anything be more extraordinary than the judicial opinion which holds, that the words of the order or decree, or whatever it may be, embracing “securities, mortgages, bonds and costs,” do not embrace judgments? And yet that is the construction which has been supported in the Court below. That interest should be allowed on the bonds and not on the judgments is not a very consistent proposition.

Let us look at the order of the 11th of July 1810, the governing order, as I think, upon this point, and see whether a reasonable doubt can be entertained that under the term “securities,” judgments must be comprehended. There is a judgment entered up on the part of the Appellant, on a warrant given by the person who had borrowed the money, to the person who had advanced it. The question is whether, in

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legal acceptance, or common parlance, judgments of any kind, but especially a judgment entered up on the warrant to confess a judgment, given by the debtor to the creditor, does not come within the description of "securities" in the order of July 1810; that order obtained by Sir Watkin Lewes, and consented to on the part of his adversaries, was "that the Deputy Remembrancer should take an account, and make a separate report of the principal and interest due to the said defendants, or claimed to be due to them, or any or either of them, upon the securities in that cause mentioned, and otherwise," &c. His Lordship, after reading the order, as set forth p. 173, *supra*, proceeded: I entertain no doubt, on the whole matter, that the word securities includes and comprehends this judgment as much as any other security.

This construction of that order affects a very material part of the case, for it affects a sum, large unfortunately from the efflux of time, arising from the accumulation of interest, with rests, which that order of the 11th of July 1810, gives upon the sums contained in the two judgments, one for 1,142 *l.*, entered up in the Court of King's Bench, in Trinity term 1778; the other for 569 *l.*, entered up in the same Court in Easter term, 1779; there is therefore to be accounted for the interest which ought to have been allowed upon the sum of 1,700 *l.* and a fraction, being the amount of those two judgments mentioned in the report of the 11th of December 1826, sent back to be reviewed by the order of the 3d of May 1827, but which, in my opinion, ought not to have been sent back.

I have now, my Lords, gone through the whole of the three points, on which I find it impossible to agree

with the Court below. There remains only the question of costs for me to consider, and upon that I did not profess to feel any great doubt when the case was last before your Lordships. We are here dealing with the case of mortgagor and mortgagee, and unless we can find anything to except it from the general rule, the costs of the mortgagee must be allowed to him. That is the general rule. There are cases of exception to that rule, but it lies on the mortgagor to show the ground of exception, and that is not done here: I am therefore of opinion that costs ought to have been given. The order of the 20th of June 1801 (*m*), was obtained by Sir Watkin Lewes, resisted, as I understand it to have been, by Mr. Morgan, and imposed upon him by the Court in favour of Sir Watkin. It is hardly possible to say how much of this tedious and costly litigation sprang from that order; if I were to say nine parts in ten of the whole costs have originated in that order,—if I were to say 99 parts in a 100 of the difficulties which have occurred, have arisen from the same source,—I should hardly exaggerate; if I were to say, that from that order arose the complexity and obscurity, which involve every part of the case, and which leave me in the predicament of not being quite certain, even at this moment, whether I have that accurate knowledge of it, which a 10th part of the time that I have given to it, if bestowed on almost any other case that I have ever known, would have enabled me to feel confident that I had attained. I am sure that at any rate, great difficulty and great expense have resulted from that unfortunate order of June 1801, which was made in substitution for a different order, under which

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(*m*) The order for the first separate report, p. 168, *supra*.

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the parties had been acting since the month of July 1796.

I shall now shortly go over the different parts of the decree in which I differ with the Court below ; I shall direct a copy of the minute in my hand to be given to Mr. Courtenay, and I am glad to see that the parties have the benefit of Mr. Gurney's note of that which I have stated. It is desirable that the note should also be communicated to Mr. Courtenay, that he may more perfectly understand what I mean to express ; and I have no doubt the parties will furnish it to him for his assistance in drawing up the order of your Lordships' House, so that every error, as to the details, may be avoided, and an accurate decree at length be made. First of all, I shall advise your Lordships to alter the decree of the 3d of May 1827, as far as it refers back to the Master the report of the 11th of December 1826. Secondly, I shall advise your Lordships to alter the order of the 12th of May 1829, and the decree of the 6th of July 1829, over-ruling the Appellant's exceptions with costs, and confirming the report of the 10th December 1828, and to declare that John Morgan had sufficiently proved his advance of 2,400 *l.*, in respect of Sir Watkin Lewes's bond or bonds, (one was a substitute for several others), and therefore that the Master's report of the 10th of December 1828, ought not to have disallowed the sum of 2431 *l.* 13 *s.* 1 *d.*, or allowed in lieu thereof 1,315 *l.* 10 *s.* Thirdly, to declare that interest should have been allowed on the judgments mentioned in the report of the 11th of December 1826, viz., on the sum of 1,142 *l.*, and 569 *l.* Fourthly, to declare, that so far as is necessary for working out the object of those declarations and making those proposed alterations, the order of the

20th of June 1801, should not have been substituted for that of the 2d of July 1796. This is necessary for effecting the views which I am submitting, though it will be found to be more of form than anything else. Fifthly, I shall advise you to allow the order of the 4th of February 1827, over-ruling the Appellant's exceptions, and to allow those exceptions only so far as is necessary for working out the object of the second and third declarations, and also as to the Appellant's costs. Sixthly, to alter the order of 12th May 1829, and so much of the decree of the 6th of July 1829,—the main operative decree,—as consists of formal declarations in the first instance, and also as far as regards the Appellant's costs, and to allow him his costs in that behalf in which he is charged with the Respondent's costs.

With respect to the cross appeal, I advise your Lordships, that it be dismissed, and the judgment of the Court below affirmed on that behalf, with the costs of that appeal to F. Morgan; and I have no hesitation in saying, that I am moved thereto by this consideration, not that I think the parties were not obliged to bring before this House the cross appeal; it might perhaps have been avoided, but as I have no power of allowing the Appellant, the representative of Mr. Morgan, his costs in the principal appeal, I am disposed on that account, which I might not otherwise have done, to allow the costs in the cross appeal to him, the Respondent in that appeal. He has been brought here by this erroneous judgment of the Court below, and in consequence of the conduct of Sir Watkin Lewes,—particularly in obtaining the order of the 20th of June 1801, in offering no evidence in support of those charges he had made in his bill, and refusing to answer the interrogatories. Those circumstances make me regret that your Lordships cannot

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give to the party who has been dragged into this litigation, his costs in the first appeal, which is the source of the principal expense ; but he is Appellant, and therefore we can give him no such costs. That, however, induces me to think that he ought to receive his costs in the appeal in which he is Respondent, though if that had stood alone, I might not have advised your Lordships to give him those costs. The result will be to give him his costs in the cross appeal, but to give no costs in the principal appeal to either party, each paying his own costs in that appeal.

I should also advise that the further consideration of the case be adjourned, in order to prepare the minutes of the order for carrying into effect these views which I have detailed to your Lordships.

The further consideration of the case was adjourned accordingly.

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Aug. 15.

The following is in substance the order entered on the minutes of this date. It is ordered and adjudged, that the said order of the Court of Exchequer, of the 4th of February 1827, over-ruling the exceptions taken by the Appellant, F. Morgan, to the Master's report of the 11th of December 1826, be, and the same is hereby reversed, and that such exceptions be allowed, and that it be referred back to the Master to review his said report. And it is further ordered and adjudged, that the decretal order of the said Court of the 3d of May 1827, be, and the same is hereby reversed ; and that the decretal order of the said Court of the 12th of May 1829, be, and the same is hereby also reversed ; and that the exceptions taken to the Master's report of the 10th day of December 1828, be, and the same are hereby allowed. And it is further ordered and adjudged, that so much of the decretal

order of the said Court of the 6th of July 1829, as directs that the receiver of the rents and profits of the mortgaged estates should pass his final account, pay in his balance, and be thereupon discharged, and the recognizances entered into by him be vacated, be, and the same is hereby affirmed; and that the residue of the last-mentioned order be, and the same is hereby reversed. And it is further ordered, that it be referred to the Master, to tax the costs of the late Respondents, John Morgan and Amelia his wife, William Farrer, the Rev. James Morgan and Mary Ann his wife, Henry Wilder and George Morgan, and also the costs of their representatives in the suit, and charge the same against the mortgaged estates, and ascertain the sum due and owing to the Appellant, F. Morgan, in respect of the principal, interest and costs. And it is further ordered and adjudged, that the said petition and cross appeal of Herbert Evans be, and the same is hereby dismissed; and that the said Herbert Evans do pay or cause to be paid to the said Respondent, F. Morgan, the sum of 230*l.* for his costs in respect of the said cross appeal; and the House doth declare that F. Morgan is entitled to be allowed all such monies as have been paid by him for costs or otherwise, under any order or orders which are hereby reversed; and he is to be at liberty to apply to the Court of Exchequer in respect thereof. 66 Lords' Journals, p. 993.

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## A P P E A L

FROM THE COURT OF CHANCERY.

The Honourable ROBERT KING - ; - *Appellant.*

THOMAS HAMLET - - - - - *Respondent.*

*Expectant  
Heir.  
Mortgage of  
Reversion.*

An expectant heir, under pecuniary pressure, mortgaged his reversionary estate, and entered into other obligations to secure payment of goods, purchased at the shop prices, with the intention of selling or otherwise disposing of them, for the purpose of obtaining money to supply his immediate wants; his father, the tenant for life of the estate so mortgaged, was privy to the transaction, and did not dissent; the expectant heir, on receiving the goods, so dealt with them that they could not be restored to the mortgagee. HELD by the Lords, affirming the decree of the Court below, that such heir had no equity to have the transaction rescinded, or to be relieved against the securities.

THIS case has been reported twice already, first by Mr. Simons, 4th vol. p. 223, upon a motion for an injunction to restrain the Respondent from suing the Appellant on the securities executed by him; and again by Messrs. Mylne and Keene, 2d vol. p. 456, on the hearing of the cause. The latter contains the judgment of Lord Chancellor Brougham, whose decree, dismissing the Appellant's bill and dissolving the injunction against the Respondent, was the subject of this appeal. His Lordship's judgment having proceeded on the fact of the Appellant's father being aware of the nature of the transaction between him and the Respondent, and consenting thereto, the evidence produced on both sides on that and on other facts assumed in the judgment, but still controverted

by the Appellant, is here subjoined. The depositions will also serve to show the circumstances of the case.

The following is the substance of the depositions of the Appellant's witnesses :—

Mr. Serjeant Lefroy deposed, amongst other things, that he was in London for a few days in the beginning of September 1828, and, previously to his leaving Ireland, had been requested by Lord Lorton to see Mr. Newland about a communication which Lord Lorton had had with him on the subject of a sum of money which was to be advanced by the Respondent to the Appellant, on the security of the Appellant's estates, Lord Lorton having stated to deponent his own incompetency to judge how far it would be advisable for him to accede to the proposal which had been made by Mr. Newland, and which was, that Lord Lorton (as his lordship informed deponent) might have an assignment made to him of such security as the Appellant should give to the Respondent for the sum of money so to be advanced by the Respondent: that in consequence of such request deponent called upon Mr. Newland, in company with his son, Mr. Anthony Lefroy; and Mr. Newland on that occasion informed deponent that Respondent was about to lend Appellant a sum of money, amounting, as deponent then best recollected, to 8000 *l.* or thereabouts, upon the security of the Appellant's estates; and deponent informed Mr. Newland of the reason of deponent's calling upon him, and stated that Lord Lorton understood that Respondent would be willing to assign to Lord Lorton any security the Respondent might obtain from the Appellant, so as to enable Lord Lorton to get a control over the property of the Appellant, and prevent him from further involving himself: deponent stated to Newland that he was anxious to know

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whether such was Respondent's intention, and although he found from Newland's reply that there was a willingness on the part of the Respondent to make such assignment, yet no specific agreement for that purpose was entered into between deponent and Newland: that Mr. Newland showed deponent a draft of the intended mortgage, and deponent looked over parts of it, but without paying any particular attention to it, and did not read it; and deponent shortly afterwards communicated to Lord Lorton what passed at his said interview with Newland; and deponent further stated, that neither Mr. Newland nor any other person did at that interview, or at any other time, inform him, or state in his hearing, that the consideration of the intended mortgage or security, or any part of such consideration, was to be formed of goods sold or to be sold by Respondent to the Appellant, and that he did at such interview believe and understand that money, and money only, was to be the consideration for the intended mortgage; nor did he at any time before the execution of that security know or suspect that the consideration, or any part of it, was formed of goods.

Mr. Anthony Lefroy, son of Mr. Serjeant Lefroy, and son-in-law of Lord Lorton, deposed, among other things, that being in London for a few days in the month of September 1828, he accompanied his father to the house of Mr. Newland, at the request and on the behalf of Lord Lorton, and on that occasion a conversation took place between deponent's father and Newland relative to some money transaction between Appellant and Respondent, but deponent did not take any active part in the matter thereof, the same being a legal matter which deponent did not understand. Newland did not on the occasion of the said interview,

or at any other time, to the best of deponent's then recollection, inform him or give him any reason to know or suspect that the consideration for any intended mortgage was to be formed wholly or in part of goods sold or to be sold or delivered by the Respondent to or for the use of the Appellant; and deponent did not, to the best of his then recollection, then, or at any other time, inform Lord Lorton that goods formed or were intended to form, or be in any manner connected with the intended mortgage.

Mr. John Bridges deposed, that he was in 1829 and 1830, and still is, employed in partnership with N. Mason, as solicitor for the Appellant and Lord Lorton, and in the month of January 1829 deponent did, by letter and notice, on their behalf, make several applications to the Respondent, in order to induce him to receive back the goods which he had sold to the Appellant, and to deliver up the securities he had taken; and deponent believed that if the Respondent had agreed to comply with these applications, the Appellant would have been, by the assistance of Lord Lorton, in a situation to restore to the Respondent the whole of the goods; and deponent believed that the Appellant had not any present income or means of support at any period between the month of September 1828 and the month of September 1829.

This deponent, on his cross-examination on the part of the Respondent, said that he had not received, nor did he expect to receive, any money from Lord Lorton, on account of costs in this suit, nor any guarantee as to the payment of the costs of deponent and his said partner in conducting this suit; in fact, they had already received through the Appellant a sum, which, to the best of deponent's belief, would be more than sufficient to cover the costs, and deponent had no reason

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to believe that Lord Lorton would in any manner, as to costs, or in any other pecuniary point of view, gain or lose by the result of this suit. And deponent further said that the balance due from Mr. Robins, in respect of the net proceeds of the sale of the articles in question in the cause, was in the first instance received by deponent from Robins, and placed to the credit of Lord Lorton in his account with deponent and partner. The whole, however, of the balance so received from Robins, together with a larger sum, was forthwith expended by deponent and his partner in the discharge of private debts contracted by the appellant, and for which Lord Lorton was in no way liable, so that in effect no part of the proceeds of the said sale was paid to Lord Lorton, or on his account.

Lord Lorton deposed that Appellant was his eldest son, was then 26 or 27 years of age, and entitled to a reversionary estate in fee, subject to deponent's life estate, in certain lands, &c. in Ireland, and in the resettlement of these lands, &c. When the Appellant was about 23, deponent granted him an allowance of 800 *l.* a year out of said lands, which was the only property the Appellant had at the time of making that settlement. That after disposing of the said allowance the Appellant had not any income or property in possession for his support until his marriage in December 1829, and deponent did not know where the Appellant resided in April, May, June, July, August, September and October 1828, and the Appellant did not during any part of that period reside with any of the members of his family, and deponent had not any sort of control over him during those months. The Appellant had, in or prior to the month of September 1828, involved himself in pecuniary embarrassments, but deponent did not at that time know, nor had he

the means of ascertaining the extent and particulars of his embarrassments, nor any means of preventing him from increasing them. Deponent knew a person of the name of James Ferrall, from the spring of 1828, and became acquainted with him in consequence of Ferrall's having introduced himself to him by a letter to deponent's brother, stating that he (Ferrall) had heard that a son of deponent's was then in the hands of sharpers; and in consequence of the said letter deponent had an interview with Ferrall in Portland place, previous to which deponent had not any knowledge of or acquaintance with him. That deponent had subsequent interviews with Ferrall, who on some of those occasions informed him that the Appellant was endeavouring to raise money upon post obits in various ways, and particularly a large sum from the Respondent, whom deponent had never seen. And Ferrall mentioned Mr. Newland as being the person in treaty with the Appellant on behalf of the Respondent in respect of such loan. And deponent, some time in or about May 1828, had an interview with Newland for a few minutes only, when Newland made some proposition to him, but the particulars of which he did not recollect, and being desirous to waive the business altogether he did not then, or at any time, come to any arrangement with any person on the subject of such proposition. Deponent requested Mr. Serjeant Lefroy, who was to pass through London about the end of the summer of 1828, to see Newland and Ferrall relative to some proposition made or about to be made on the part of the Respondent respecting loan transactions, in which the Appellant was concerned, with a view to prevent deponent getting into difficulty in regard to the said transactions, as he had reason to believe that the said

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persons were endeavouring to get deponent to enter into a counter security to the Respondent; and deponent was afterwards given to understand by Mr. Lefroy himself, as deponent best recollects, that Mr. Lefroy did see Newland respecting the said matter, but what occurred at such interview deponent did not know. When he requested Mr. Lefroy to see Newland, he believed, from what passed from Newland at the interview he had with him at the United Service Club, that the Respondent was acting *bond fide* through Newland with regard to the loan of 8,000 £., which deponent was given to understand had been made to the Appellant by the Respondent, and respecting a mortgage to be given by the Appellant of his reversionary estate, but deponent does not now recollect whether he did or did not form any belief that the Respondent would, in case of his completing the said loan transaction, make any assignment to this deponent, or whether deponent did in any manner interfere in such matter. Neither Newland, nor Mr. Anthony Lefroy, nor Mr. Serjeant Lefroy, nor the said James Ferrall, nor any other person did, at any time prior to the date and execution of the mortgage which deponent had been given to understand was given by the Appellant to the Respondent for securing 8,000 £. in any manner inform deponent, nor did he at any time before the date and execution of such mortgage in any manner learn, or for any reason suspect, that any goods formed wholly or in part the consideration for the said mortgage; and deponent did not hear anything respecting the said mortgage until after it had been executed; and upon being informed that articles of jewellery formed the consideration for the mortgage, it was proposed to deponent by some of his friends that if he would advance a sum of between

2,000*l.* and 3,000*l.* it might be the means of bringing the matter to a conclusion with the Respondent, and deponent did assent to such proposition, with a view of getting Appellant clear of all dealing with the Respondent; but whether deponent did or did not authorise any steps to be taken thereon he does not now recollect.

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Lord Lorton, in his cross-examination, said he was not interested in the event of the suit, except as being the father of the Appellant, he could not feel indifferent to his success. The solicitors for the Appellant were recommended to him by deponent, whose solicitors they are, and with them deponent was in occasional communication on the subject of the suit, but they were employed by the Appellant himself, and acted principally under his direction. Deponent did not agree or undertake in any respect, or in any event, to pay or secure the costs of the suit.

Mr. Ford deposed that the Appellant was in great pecuniary embarrassment in the months of March and April 1828, and was desirous of raising a loan of 8,000*l.* or 10,000*l.*; that some time in April or May in that year Newland called upon deponent and asked whether he was not concerned for the Appellant, and on deponent's answering in the affirmative, Newland said that he had a client who would lend him 10,000*l.*, and deponent requested to know the name of the client, which Newland declined giving; and he then asked deponent to name the security, which deponent explained to him to be the securities before-mentioned; whereupon Newland requested deponent to furnish him with an abstract of the title to the property, and in consequence thereof deponent did shortly afterwards deliver to Newland an abstract of the title; that various meetings were subsequently had between

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deponent and Newland on the subject of the terms and conditions of the said required loan; that Newland would not on any of those occasions tell the name of his client, but after some days he informed deponent that his client would not make the advance all in money, but one moiety in goods and the other in Bank notes, and the goods should consist of silver or plate; that Newland sometime afterwards informed deponent that his client, whom he then stated to be the Respondent, had no ready-money to lay out, but would complete the contract to the extent of 8,000*l.* if the Appellant would take the whole in goods, which should be all plate; that deponent communicated the matter to the Appellant, who appeared then to be in great want of money, and desired deponent to conclude the last-mentioned contract with the Respondent. The mortgage was accordingly executed by the Appellant the 28th of October 1828, at the Respondent's house of business, and the consideration actually given for the same consisted of articles of plate, jewellery, diamonds and pearls, selected by the Appellant, assisted by deponent, in the presence of the Respondent. Deponent advised that the whole consideration should be taken in silver plate, but the Respondent objected, and said the amount should be taken out of his general stock. The Appellant had not any use or occasion for the said goods otherwise than for the purpose of selling them in order to raise money; and of that deponent believed that the Respondent was aware, from the general circumstances of the case, and the total inapplicability of the said goods to the Appellant's then situation in life or his wants, not being a housekeeper, nor married, nor about to marry. The goods so selected were not delivered to the Appellant at the execution of the mort

gage, the Respondent refusing to deliver them until the mortgage deeds were registered in Ireland, and until Newland was paid 400*l.* for his charges for the mortgage, and it was about a month from the execution of the mortgage when the said goods were delivered to deponent on behalf of and for the Appellant. The goods were not valued by any jeweller or other person on behalf of the Appellant at the time they were selected.

Mr. George Henry Robins deposed that on the 8th of December 1828 he advanced to some person, for the use of the Appellant, the sum of 2,500*l.* on security of the articles of plate and jewellery in the pleadings mentioned ; and that he did in the month of March 1829 sell the said goods by public auction. The sale was well attended, and the said goods were sold for the best and highest prices which could be reasonably got for them, the purchasers thereof being principally dealers ; and the money produced by the sale was 3,482*l.* 7*s.* 2*d.*, which, under the circumstances, was as much as such goods could be reasonably expected to sell for at a forced sale, of which description the said sale was. The amount of the net proceeds arising from the sale, after deducting the said sum of 2,500*l.* and the sum of 348*l.* 4*s.* 6*d.* for commission and expenses, was 528*l.* 10*s.* 9*d.*, exclusive of the sum of 37*l.* 9*s.* 6*d.*, the amount of part of the said goods which were at the said sale bought for the Appellant. The goods were in the same plight and condition at the time of the sale as when they came to this deponent's possession, except that they were not so clean. The Respondent did not attend at the sale, and neither deponent nor any other person was instructed to bid on his behalf, nor had deponent any communication with the Respondent

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relative to the sale of the goods; his instructions were received from Ford.

The following witnesses were examined on behalf of the Respondent:—

Mr. Montague Newland deposed, that previous to the purchase by the Appellant of the before-mentioned articles of plate and jewellery in October 1828, it was agreed between the Respondent and deponent as his solicitor, and the Appellant and Mr. Ford as his solicitor, that the said articles should not be delivered to the Appellant until the deeds forming the security for payment for them should be registered in Ireland, and the requisite searches made there for prior incumbrances. That, after the said deeds were registered, and the searches made, in the month of November 1828, deponent gave an order authorizing the delivery of the said articles to the Appellant. That, in April 1828, previous to the negotiation respecting the said articles, deponent was applied to by Mr. Farrell, and Mr. Burt, a solicitor, to know if any client of deponent's would advance the Appellant about 5,000 £. or 6,000 £., in consequence of which deponent communicated with a gentleman who, on inquiry, declined making the advance; that Farrell and Burt then applied to know whether Mr. Hamlet would assist the Appellant, and they proposed that the advance should be partly in money and partly in goods, and should be secured on an annuity and a reversionary interest belonging to the Appellant; that deponent accordingly proposed to the Respondent to make an advance, and, to the best of his recollection and belief, mentioned to him that the Appellant wished to have part in money, but whether deponent said anything about money or not, the Respondent said that he should not object to let the Appellant have goods to the amount

proposed, and it was ultimately agreed that the transaction should wholly consist of goods; that at the commencement of the negotiation, Burt acted as the solicitor of the Appellant, but in an early stage of it Mr. Ford stated himself to be then the Appellant's solicitor, and the negotiation was then carried on and concluded between deponent on the part of the Respondent, and Ford on the part of the Appellant; that it was first proposed that the payment for the goods should be secured by mortgage on the Appellant's annuity of 800 £., and on the reversionary life estate to which he was entitled on the death of his father; that, in the course of the negotiation, the Appellant disposed of the whole of his annuity, and the Respondent hesitated very much whether he would accept the remaining security on the Appellant's contingent reversion; that Farrell intimated to deponent that Lord Lorton was very desirous to save the reversionary estate from being absolutely disposed of, and that if the Respondent would accept a mortgage not redeemable within four years as his security, Lord Lorton would pay off the debt and take an assignment of the mortgage, and with that prospect deponent recommended to the Respondent to accept the proposed mortgage; that it was at first proposed that the goods to be purchased should amount to 5,000 £., but afterwards Farrell proposed that the credit should be increased to 8,000 £., and it was then agreed that goods to that amount should be purchased by Appellant of Respondent; that Farrell, on repeated interviews with deponent in the course of the negotiation, declared most distinctly that Lord Lorton was aware that the Appellant was to have goods and not money from Respondent, as the consideration for the proposed mortgage, and that Lord

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Lorton concurred in the transaction, though deponent understood from Farrell that his Lordship would not make himself an avowed party to it on account of the dealing, and deponent believed at the time, and still believes, that Farrell was acting as an agent for Lord Lorton, and was in communication with him upon the affairs of the Appellant, and was authorized to state Lord Lorton's concurrence in the said transaction, for Farrell showed deponent letters that he had from Lord Lorton relating to the affairs of the Appellant, and it was from one of these letters that deponent first learned that the Appellant had sold a portion of his annuity; that the only interview which deponent had with Lord Lorton previous to the completion of the said purchase, was by the introduction of Farrell at the United Service Club, in June 1828, by desire of Lord Lorton; that on the 3d of September 1828 deponent received a letter from Mr. Anthony Lefroy, requesting to see deponent upon particular business, and on the 5th of that month Mr. A. Lefroy and Mr. Serjeant Lefroy called upon deponent, and upon that occasion deponent handed the draft deed of mortgage to Serjeant Lefroy for his perusal, and whilst he was engaged in perusing the draft, deponent and Mr. A. Lefroy entered into conversation respecting the transaction between the Appellant and Respondent, in the course of which deponent perfectly remembers and can positively state, that he mentioned to Mr. A. Lefroy that the transaction was entirely for goods, and deponent at the same time pointed out how much better it would be for Lord Lorton to advance his son the money, and take the mortgage himself; as, if the Appellant were to sell the goods purchased of the Respondent, there must be a considerable loss sustained by him, upon which Mr. A. Lefroy replied,

“ Oh, never mind the sacrifice, so that the estate is saved,” or expressions to that effect, and deponent had no doubt but that Mr. A. Lefroy distinctly understood, that the Appellant was to have goods and not money on the security of his reversionary estate ; that Mr. Serjeant Lefroy was in the same room with deponent, and Mr. A. Lefroy, whilst the said conversation was going on, and though engaged in perusing the draft, yet as the conversation passed in an ordinary tone of voice, deponent thinks it scarcely possible but that Mr. Serjeant Lefroy must have heard what was said by deponent and Mr. A. Lefroy. At the same interview deponent pointed out to Mr. Serjeant Lefroy the advantage which would accrue to Lord Lorton by permitting his son to deal with his reversionary estate by mortgaging it, as such an act would have the effect of confirming the family settlement ; and in reply to deponent’s observations, Mr. Serjeant Lefroy stated, that on his return from the continent, he should certainly recommend to Lord Lorton to redeem the mortgage which the Appellant was about to grant ; that deponent did not upon any occasion after his earliest communication with the Respondent upon the subject of an advance to the Appellant, give the friends or father of the Appellant to understand that he was to have money from the Respondent on the proposed security ; that the said draft remained in the same state as when it was perused by Serjeant Lefroy, except that so much as related to the charging of the annuity, which, at the time the draft was drawn, had not been disposed of by the Appellant, was subsequently struck out, in consequence of the Appellant’s having assigned the same.

Deponent, on his cross-examination in behalf of the Appellant, said, he applied in person to the Respondent in April or the beginning of May 1828, for the first time,

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on the subject of the required loan, and then told him that Appellant wished to deal with him to the amount of 5,000 £., and wished an advance of some money, upon which the Respondent desired him to investigate the Appellant's title to the proposed security, and if he approved of the same and obtained the sanction of Lord Lorton to the transaction, he would supply Appellant with shop goods to the amount of 5,000 £., in the same way as he did his other customers, at the market prices of his shop; that deponent did at the commencement of the said transaction believe and understand that the Appellant was a young man of the age of 25, and that he was not then living under his father's roof, or under his control; and deponent on his first interview with Respondent, on the subject of the said loan, informed him that the Appellant was then of age, and living independently as a Member of Parliament, and he did not then or at any other time inform the Respondent of the Appellant's situation with his father, or of his rank, connexions and expectancies or otherwise, relative to his wanting to raise a loan, or having occasion for money, save as hereinbefore stated; deponent did not then know or suspect that the Appellant had no use for the said goods, or some of them, nor that he did not intend to keep the whole of them, but deponent suspected, heard and believed that the Appellant did intend to sell some of the said goods. Deponent, after communicating with the Respondent relative to the required loan, stated to Ford, that he would endeavour to get the Respondent to advance some money, as well as to let the Appellant deal with him for goods upon the security of the reversionary property and annuity, but such intention was not carried into effect on account of the Appellant having disposed of the annuity and thereby leaving no fund

applicable to the payment of interest and premiums of insurance; that in June 1828 deponent was introduced to Lord Lorton by Farrell, who appeared to be on intimate terms with his Lordship, and deponent did then converse with Lord Lorton, relative to the Appellant's wish of raising money, and strongly urged him, to advance the Appellant any money he might stand in need of, and take the security of the reversionary estate and annuity to himself in the name of a trustee, to prevent the Appellant further incumbering the same; and Lord Lorton said he would consider the proposal, but did afterwards, as deponent was informed, decline the same on account of its not being convenient to him to advance the money. Deponent did not inform Lord Lorton, or lead him to believe, save as aforesaid, that the Appellant was raising money; Lord Lorton did evince and express his anxiety to preserve the family estate, as the best means of checking the Appellant in his career. At the time deponent had that interview with Lord Lorton, it was contemplated by deponent that the greater part, and by the Respondent that the whole, of the advance required by the Appellant, should be made up of goods to be sold and delivered to him by the Respondent, but deponent did not inform Lord Lorton of either of the said matters, or state to him anything relative to goods, deponent having left Lord Lorton under an impression that his Lordship would advance the money himself; previous to, and at the time when deponent showed the mortgage draft to Mr. Serjeant Lefroy, it had been settled and agreed by Farrell, and by deponent, and by the Respondent, that he should sell to the Appellant goods to the amount of 8,000 *l.*, for which he was to have the proposed mortgage security. Deponent did

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not inform Ford at any time, that the Respondent could not advance the whole of the loan in cash, or that he would advance half in cash and the remainder in goods, but he did say to him that the Respondent would allow the Appellant to deal with him for goods, and take security for the amount of such dealing. Deponent attended at the shop of the Respondent on the 28th of October, and took with him the proposed mortgage deed engrossed and ready for execution, and also a promissory note for the sum of 8,000 *l.*, and a warrant of attorney for entering up judgment in his Majesty's Courts of Record in Ireland against the Appellant, at the suit of the Respondent for the said sum and interest. Ford and the Appellant were in the said shop when deponent went there, and were then selecting some articles of goods, and they continued so doing in the presence of deponent and also of the Respondent; and the articles so selected formed the consideration for which the mortgage and other securities were prepared; and the Appellant then and there executed and signed the said mortgage and warrant of attorney and promissory note, after the goods were selected and set apart.

Deponent advised the Respondent not to part with the goods until deponent's demand of 400 *l.* for his costs as solicitor in the said business was satisfied, and the deeds properly registered, and the securities made perfect by the searches for incumbrances, &c.; and the Respondent retained the goods for about a month after the date and execution of the mortgage security, for the reasons before stated.

John Henry Woolbert, shopman to the Respondent, deposed that he assisted in selling to the Appellant on

the 24th of October 1828, articles of plate and jewellery, and in taking his orders for some spoons to be manufactured for him, and the prices charged for the said articles respectively were the lowest prices at which such goods were usually sold by the Respondent at that period; that it was the practice for every article exposed to sale in the Respondent's shop to be labelled with the price thereof; not in private marks, but in plain common figures, intelligible to every person; and it was invariably the practice for every article so labelled to be sold at the price marked without any abatement or deduction whatever, except for prompt payment, in which case the usual discount of five per cent. was allowed to the purchasers. The prices of articles sold by the Respondent were determined by adding to the cost price a profit of about 25 per cent. on jewellery, of about 17 per cent. on articles of plate generally, and of about 12½ per cent. on silver forks and spoons and other similar articles of small plate. The price of the articles selected and purchased by the Appellant was labelled on each article according to the usual mode adopted in the shop, and the prices were the ordinary prices charged to customers in general for similar articles, and the selection was made from the general stock of the Respondent, at that time exposed for sale to customers in general, and the selection of the said articles by the Appellant and Mr. Ford was made freely, not in any respect controlled by deponent or any person acting on the part of the Respondent, nor did deponent or any person acting for Respondent in the said sale intimate to the Appellant, or Mr. Ford, that they must not select all articles of plate, but must take some jewellery, or say anything to that effect.

Deponent on his cross-examination deposed, that

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at the time the Appellant came to select the said goods, deponent did not know or believe or suspect that the Appellant and Respondent were not dealing by way of *bonâ fide* purchase and sale of goods in the usual course of trade, or that the said transaction was by way of loan, or that the goods were to be substituted for money, or that the Appellant had no use or occasion for the jewellery selected for him, or that he did not intend to keep the same; and by an observation made by Ford on that occasion, that some of the articles would do for the Appellant on his marriage, and some of the articles of plate having been made to the particular order of the Appellant, deponent believed that he did intend to keep the articles, and he then believed, from the appearance of the Appellant, that he was at that time of the age of 23 or 24 years, and unmarried; but did not know or believe or suspect that the Appellant was not a house-keeper, or that he was in embarrassed circumstances, or intended to sell or dispose of, or pledge, or otherwise to raise money on or by means of the said goods.

John Evans and John Rowe Snow, two more of the Respondent's shopmen, deposed to the same effect; and the latter further said, on his cross-examination, that Mr. Ford took an active part in the selection of the goods for the Appellant, and that it was not unusual for persons purchasing goods in the Respondent's shop to be accompanied by their law agents or solicitors, and he named two purchasers who were so accompanied.

Christian Etzerods, a jeweller and diamond worker, John Linnett, a goldsmith, and Samuel Norman, a silversmith, being examined on behalf of the Respondent, and cross-examined for the Appellant, said they saw and valued the goods, of which respectively each

of them had most knowledge, while they were in the possession of Mr. Robins or of his bankers, and they considered the prices at which they were sold to the Appellant fair and reasonable, and such as jewellers generally charged. Mr. Linnett would give 4,000 *l.* for the whole if he wanted such articles.

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*Sir William Horne* and *Mr. Pemberton* (*Mr. J. B. Parry* was with them), for the Appellant.

The case was to be considered by their Lordships in two points of view ; first, supposing Lord Lorton to be altogether unconnected with it, and secondly, supposing him to be connected with it. The bill was filed by the Appellant alone. It was proved in evidence that the transaction proceeded from a negotiation with the Respondent, for a loan of money ; it was not the case of a sale of goods in the course of the Respondent's trade, but an advancement of goods, instead of money, to supply the Appellant's necessities. Under the mask of trading, a method was adopted of lending money at an extraordinary rate of interest, the Respondent taking advantage of the Appellant's necessities. The very nature of the goods must have satisfied the Respondent that the Appellant's object was not to obtain goods, but an advance of money. They comprised many articles of the same class : for example, three diamond necklaces, a diamond and ruby necklace, and a pearl necklace, and the price of the latter alone exceeded 1,500 *l.* Did the Respondent, an intelligent tradesman, and man of the world, suppose that the Appellant mortgaged his reversion with a power of sale, insured his life at a considerable cost, and gave his note for 8,000 *l.* payable on demand, with warrants of attorney for both England and Ireland, so that neither he nor his property could have any escape,

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at a time that he was separated from his family, and had, to the knowledge of the Respondent, disposed of his only present resource, the annuity provided for him out of the family estates—did he suppose that the Appellant entered into such liabilities and paid an attorney's bill to the amount of 400*l.* in order to play with such toys as diamond, ruby, and pearl necklaces? The Respondent well knew that the Appellant obtained them only for the purpose of supplying his urgent occasions for money. The extent, as well as the nature of the purchase, proved it: the Appellant's attorney selected most of the articles, and according to his evidence, wished to avoid jewellery, and to obtain plate as a more ready money article, but this the Respondent's shopman would not permit. The goods were detained by the Respondent for a month, till the deeds were registered, and the attorney's bill paid—a singular mode of treating a customer for 8,000*l.* worth of jewellery, although the securities carried interest immediately from the day they were executed, and therefore, as against the Appellant, it was a ready-money transaction. A month after the selection of these articles, they were sent by the Respondent to the office of the Appellant's attorney; from his office they quickly found their way to the auctioneer's warehouse, and having been submitted to public auction, they were sold at prices so ruinous to the Appellant, that it would have been acting mercifully towards him, if the Respondent had at once deducted 60 per cent. from the 8,000*l.* proposed to be advanced and taken a security for the 8,000*l.* at five per cent. interest. Unless an end is put to this branch of equitable jurisdiction, this transaction cannot stand. Where a shopkeeper knows that the sale of his goods in his shop is simply nominal, and that

they must be really sold in a very different market, equity relieves against a pretended sale in the shop, and treats it as a loan having an usurious tendency and as a catching bargain, and allows him only the sum realised by the sale in that market, to which he knew they were destined. *Barker v. Vansommer* (a).

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This Appellant was an expectant heir. It is not denied that an expectant heir may well mortgage his expectancies for a *bond fide* advance of money; but he cannot borrow money in the shape of goods, and then mortgage his expectant property to secure the amount of the bill; if he be rash enough to do so equity will protect him from the consequences. A sale by him out and out of his reversion at an under-value cannot be maintained; a mortgage is a partial sale, and may operate as a total alienation, and therefore is governed by the same rule. This was simply an attempt to evade the rule and to secure to the Respondent 30 per cent. principal, beyond what he actually parted with. The transaction was such as induced the Respondent, not to consult his own regular professional advisers, but he put the matter into the hands of Mr. Newland. The Respondent was throughout aware that the Appellant was a young man unmarried, not a housekeeper, and not living under the control of his father. While this very transaction was in progress, the Appellant was compelled by necessity, as the Respondent knew, to sell the whole of the provision made for him only shortly before, in

(a) 1 Bro. C. C. 149. As the counsel read Lord Thurlow's observations in that case, Lord Lyndhurst expressed a doubt whether the facts were correctly stated in the report to warrant the observations referred to. The agent for the Appellant afterwards, as the reporters have been informed by one of the counsel, procured and sent to Lord Lyndhurst the pleadings and briefs in the case, and the report in 1st Brown was found to be correct.

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resettling the family property. The transaction commenced in an application for a loan of only 5,000 *l.* in money, but because the proposed loan changed its character, it was necessary to enlarge the amount to 8,000 *l.*, in the delusive hope that it would realise 5,000 *l.*; but to the Appellant the produce was only 2,730 *l.* The Respondent did not even make his customary rebate of 5 *l.* per cent. for ready money, which in this case would have amounted to 400 *l.*, although the mortgage carried interest at 5 *l.* per cent. from its date. The real nature of the transaction could not be stated with safety; in the mortgage, therefore, the Respondent described himself not as a goldsmith in Sidney's-alley, but as an esquire, in Cavendish-square; it stated, not a dealing for goods, but a debt from the Appellant to the Respondent of 8,000 *l.*, and the Appellant was made in the body of the deed to admit the receipt of the 8,000 *l.*, and a receipt was indorsed on the deed, and signed by the Appellant, which, contrary to the truth of the transaction, represented the 8,000 *l.* as then paid down in money. Advantage was taken of the Appellant's necessities, not only by the substitution of jewellery for money, and by the retention of the goods until Mr. Newland's demand of 400 *l.* for his costs was satisfied, but also by the oppressive nature of the securities. Powers of sale of the Appellant's reversion in the family estates in case of default in payment of even any half year's interest; policies of insurance for 8,000 *l.*; warrants of attorney for entering up judgment against him in England and Ireland; a judgment in Ireland; a promissory note for 8,000 *l.* payable on demand, although, by the deed, three years' credit was given; all attested the grinding, gripping nature of the transaction, and the absolute dominion which the Appellant's needs

sities had given the Respondent over him. Was this then a case in which a court of equity ought not and was not bound to relieve?

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Next as to Lord Lorton's knowledge of the dealing. Even was it to be assumed, contrary to the fact, that the Appellant's father was informed by the Respondent or his agents of the real nature of the transaction, that would not afford a sufficient reason for withholding all relief from the Appellant. The father's knowledge would not destroy the son's equity. But where the transaction was behind the father's back, that circumstance was in general unfavourable to the lender, and formed an additional reason for treating the case as opposed to public policy. Again, if it was to be assumed that Lord Lorton's object was to obtain a power over the Appellant's expectant estate, and that with such view he encouraged the Respondent to furnish the Appellant with goods to the amount of 8,000*l.* on security of that expectant estate, in order that he (Lord Lorton) might afterwards get an assignment of the mortgage, as the Appellant had no knowledge of his father's interference or of his having any intention of that kind, such interference could not defeat the expectant heir's own equity to be relieved from the imposition practised upon him. In truth, Lord Lorton, as the evidence proved, never knew that it was intended to advance goods and not money to his son; and when the real transaction was disclosed to him, he refused any assistance to his son, except upon the condition that the Respondent would take back the goods, which he refused to do. Now the Respondent's equity is made to rest upon the communications with the father: such a defence only the more strongly marks the nature of the case against the Appellant. The subsequent sale of the goods by the Appellant,

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though it might modify, is not sufficient to deprive him of the relief which equity affords to expectant heirs against oppressive bargains. The sale did not put it out of the power of the court to administer a specific measure of relief, since the cost price and the sale price (which included the manufacturer's and shop profit of the goods), and also the value upon a sale by public auction, and the expenses attending such a sale, all distinctly appeared in evidence. The Respondent himself occasioned the sale, by his refusal to take back the goods and rescind the transaction. There are no facts or circumstances in this case to justify the conclusion that the pressure of the Appellant's necessities ceased from the time he offered to return the goods to the Respondent. On the contrary, it was proved in evidence, that the Appellant continued wholly destitute of any property or income in possession, until December 1829; and that the offer of assistance from the Appellant's friends to redeem the goods from Mr. Robins was conditional, on the Respondent's agreeing to receive back the goods. And if his father's qualified offer, which was not accepted, is to deprive the Appellant of his equitable title to relief, such a rule will in future deter parents from offering in such cases a reasonable assistance to their sons; since, if the proffered assistance should prove ineffectual, it will be made the ground of upholding the very transaction which it was their object to avoid. Such a doctrine is against principle, and altogether unsanctioned by legal authority.

In addition to the cases referred to in the argument and judgment in the Court of Chancery, the cases of *Gowland v. De Feria* (b) and *Portman v. Taylor* (c) were cited.

(b) 17 Ves. 20.

(c) 4 Sim. 182.

Mr. *Knight* and Mr. *Stuart* for the Respondent :—  
All argument upon the sale of reversionary interest by an expectant heir, might have been spared in this case. This was not the sale of a reversion, but the borrowing of money at interest, or, which comes to the same thing, the purchase of goods for a money price, and giving the reversionary property as security for payment. The transaction sought to be impeached was proved by the evidence to have been perfectly fair; and the Appellant was competent to bind himself thereby, and did knowingly and deliberately so bind himself.

It was proved beyond contradiction or doubt, that the Respondent refused all along to allow the Appellant to purchase his goods on the security in question, unless Lord Lorton, the Appellant's father, was informed of the transaction; and Lord Lorton not only was not kept in ignorance of the negotiation, but encouraged the prosecution of it. The draft of the mortgage deed was sent to and perused by Mr. Serjeant Lefroy, the Appellant's brother-in-law. It was impossible to suppose that Serjeant Lefroy, or any man conversant with conveyancing, could mistake the object of that deed and fancy it was a security for the advance of money.

The relief now sought on behalf of the Appellant, is to compel the Respondent to deliver up his securities, upon receiving the inadequate price for which the articles purchased from him by the Appellant were allowed to be sold by auction, after Lord Lorton had interfered, through his own solicitors; the Appellant himself being a purchaser of some of the articles at that sale, pending the first suit commenced by Lord Lorton's solicitors for the Appellant, with Lord Lorton's concurrence, praying to rescind the transaction upon a redelivery of the goods, and also praying that

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the goods might be kept in safe custody in court; which first suit was allowed to be dismissed for want of prosecution. That sale produced between 3,000 *l.* and 4,000 *l.*, which was not near the value of the articles, but yet was as much as could be reasonably expected under all the circumstances. It was a general auction of a vast variety of goods, there being only 75 articles of those purchased by the Appellant of the Respondent. The allegations in the present bill as to the value of the articles, are not only wholly unsupported by evidence, but there is clear evidence that the articles were of the full value for which they were sold to the Appellant, and for which the security was taken.

There is no proof that the Appellant was under any pecuniary pressure when he executed these securities, and no reason to say that advantage was taken of his distress. He was in all these transactions accompanied by his own attorney. There is no case in which relief has been granted without the restoration of the goods, except that of *Barker v. Vansommer*, which was a mere device, shift and conspiracy to commit fraud and obtain usurious interest, and was wholly different from this case, in which neither usury nor fraud exists. The true nature and essence of this transaction sought to be set aside is, that goods were transferred to the Appellant on credit, at the ready money prices, he giving security for payment with interest; that the Appellant took the goods and converted them to immediate use, the imprudence of which conduct was his own affair; and that he now prays relief, not on the principle of restoration, but by fixing the Respondent with a loss, amounting to the difference between the price at which the goods were sold in his shop, and the price which, after much damage,

they fetched at auction, which was a forced sale. That is what the Appellant calls equity: he would have back his estate in the state in which he mortgaged it, but he would not restore what he received in consideration, nor an equivalent. There is no reciprocity in that sort of dealing; there is no equity in it, and the House will not sanction it.

The learned counsel, after referring to the judgment of the Lord Chancellor in the Court below, adopted his Lordship's course of reasoning, and, in addition to the cases there mentioned, they cited and commented on the other cases which had been referred to on behalf of the Appellant.

Sir *William Horne* in reply:—The transaction was tainted in its origin. The contract was admitted to be for goods, which were to be sold forthwith to raise money for the Appellant. If the goods had continued in the possession of the Appellant, and if he offered to return them, and the Respondent refused to take them, would the Appellant have lost his equity by reason of a subsequent sale, and inability to restore them? But it was in evidence, that an offer was made to restore the goods, and was refused. The Appellant being under continuing pressure, and not being able to pay Mr. Robins the 2,500 *l.* advanced by him on the goods, was obliged to raise that sum by sale of them. But the sale of the goods made no difference in this case. The Appellant's equity was in the original transaction; if that was against the principles of the courts, it could not be reconciled to them by any subsequent conduct of the Appellant, who never for one moment was free from his embarrassment until he filed the bill. He relied on the case of *Barker v. Vansommer* before cited.

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Lord *Brougham*, in moving that the case be adjourned for further consideration, observed, at the same time that he did not think there was any ground to say, that the general principle acted upon in courts of equity, in the cases cited, was involved in this, but there were peculiarities in it not to be found in those cases.

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Sept. 5.

Lord *Lyndhurst* having this day moved the judgment of the House in other cases, said, with respect to this case, "I attended during the arguments and paid every attention to the reasoning of counsel at the bar; I have since very carefully and deliberately read the papers, the pleadings and depositions, and also the elaborate judgment of Lord *Brougham* in the Court below; the conclusion to which I come is, that I see no ground whatever to dissent from the judgment so pronounced."

It was accordingly ordered and adjudged that the appeal be dismissed, and that the decree complained of be affirmed, but without costs.

## APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

1835:  
August 3.

The Rev. JOHN BOUVERIE and Sir THO- } *Appellants.*  
MAS STAPLES, Baronet - - - - }

The Right Hon. HECTOR JOHN GRA- } *Respondents.*  
HAM, Earl of NORBURY, and Others - }

A testator devised his estates to his eldest son, but charged certain of them with legacies to his younger children, specifically charging one of such legacies amounting to 10,000*l.* upon one of his estates, and another legacy of 20,000*l.* upon a different estate. He then made other devises and bequests, and directed that a certain house and his residuary property should be sold in payment of his debts and in case of his real estates. The legatee of the 10,000*l.* filed a bill to have the trusts of the will declared and executed. Creditors were directed to come in, and the estates specifically charged with payment of the debts were found not sufficient for that purpose. The Court afterwards directed a reference to the Master to take an account of the debts, and that in taking such account he should report the order and priority of such debts and incumbrances, and particularly that he should inquire and report whether any and what sum remained due to the person entitled to the legacy of 20,000*l.* and the priority thereof. This legacy had been assigned to trustees under a marriage settlement, and they were not parties to the suit, but went in with others upon the reference to the Master. The Master made a report of the amount of the debts, and found that this legacy was a charge affecting this particular estate, but was only next in priority after the payment of the judgment and bond debts of the testator. HELD that such finding was right.

*Practice.*  
*Master's Re-*  
*port.*

BY a settlement made in 1743, upon the marriage of John Ponsonby with Lady Elizabeth Cavendish, cer-

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tain lands situate in the county of Cork, and among others the towns and lands of Aghavine, Bryades, Ballymorrisheen, Cooleloughfinny, Cornweagh, Gortcorkeran, and Garryjames (named in this suit as the lands of the first denomination), were settled to the uses of the marriage.

William Brabazon Ponsonby was the eldest son of that marriage; he attained 21 in the year 1766, and by an indenture dated 6th November 1769, he joined his father in making a tenant to the precipe for suffering a recovery, and in Michaelmas Term 1769 a recovery was suffered, pursuant to such indenture, of the said barony, &c., in the county of Cork, excepting and reserving thereout the said towns and lands of the first denomination, which recovery was to enure to such uses as should be declared by any deed to be thereafter executed by John Ponsonby and William Brabazon Ponsonby jointly.

William Brabazon Ponsonby shortly afterwards married the Honourable Louisa Molesworth, and by deed, dated December 1769, made a re-settlement of the Cork estates, excepting as before the seven townlands of the first denomination, mentioned in the indenture of November 1769.

John Brabazon Ponsonby was the eldest son of this marriage.

In Trinity term 1777, John Ponsonby and William Brabazon Ponsonby suffered a recovery of the seven towns and lands of the first denomination, and by the deed to lead the uses, dated 24th May 1777, it was declared that such recovery, when suffered, should enure to such uses as should be declared by any deed executed jointly by John and William Brabazon Ponsonby under their hands and seals; and by indenture dated 16 June 1777, executed by them, they conveyed the seven townlands to trustees, upon

certain trusts, with a power to themselves, or the survivor of them, to revoke such trusts and appoint others. This power was exercised by the said William Brabazon Ponsonby, after his father's death, by a deed poll, dated the 20th June 1788, appointing the seven townlands to himself in fee.

John Ponsonby, by will, dated 5th July 1781 (in pursuance of a power reserved to him by the settlement of October 1769), charged the settled estates with an annuity of 300*l.* to his second son George Ponsonby for his life. John Ponsonby died shortly after making this will.

In Michaelmas term 1802 a fine was levied, and a common recovery suffered, by the said William Brabazon Ponsonby and John Brabazon Ponsonby, of the manor and lands, excepting the seven townlands of the first denomination, but including the seven other townlands of the second denomination.

By a settlement, dated in January 1803, and made on the marriage of John Brabazon Ponsonby with Lady Fanny Villiers, William Brabazon Ponsonby, the father, and John Brabazon Ponsonby, his son, conveyed the manor of Inchiquin, and the lands before mentioned, situate in the county of Cork, "save only and except the seven townlands of the first denomination, and saving also and reserving out of said grant and conveyance seven other townlands, called the seven townlands of the second denomination, part of the said manor, (that is to say) the town and lands of Kilnatoragh, Ballyvarrigheitra, Drissanmore, Drissenbeg, Mullarys, Ballycoleman and Barnacoley East," which it was thereby declared were not intended to pass by any general words in the said deed contained, but were to remain subject to such uses, trusts and purposes as might thereafter be

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limited and expressed respecting the same, jointly by the said William Brabazon Ponsonby and John Brabazon Ponsonby his son, to the use (subject to the jointures of Louisa Ponsonby and Lady Fanny Villiers) of William Brabazon Ponsonby for life, remainder to John Brabazon Ponsonby for life, remainder (subject to an intervening term of years for raising younger children's portions) to the use of the first and other sons of the said John Brabazon Ponsonby, severally and successively in tail male, with similar limitations to the brothers of John Brabazon Ponsonby, and their respective sons, and with the ultimate remainder to William Brabazon Ponsonby in fee.

By a subsequent indenture, dated the 4th February 1803, and which deed was executed by John Brabazon Ponsonby, but was *not* executed by William Brabazon Ponsonby, it was expressed that William Brabazon Ponsonby and John Brabazon Ponsonby did thereby grant the said towns and lands of the second denomination unto trustees, upon trust to permit William Brabazon Ponsonby and John Brabazon Ponsonby during their lives, or John B. Ponsonby after the death of his father, by sale or mortgage, to raise such sums of money as they should find necessary for their convenience.

William Brabazon Ponsonby, by his will, dated 23d December 1803, after reciting, that, by his marriage settlement, a sum of 8,000 *l.* was provided for his younger children, to be divided amongst them in such shares as he should appoint, and that on the marriage of his third son, Richard Ponsonby (now Bishop of Derry), he had appointed 1,000 *l.*, part of a sum of 8,000 *l.*, for the younger children of the said Richard, if two, 2,000 *l.*, if three, 3,000 *l.*, and if four,

or more younger children, 4,000 *l.*; the testator did appoint the remaining 4,000 *l.*, of the sum of 8,000 *l.*, as also such further parts thereof as should be raised on the contingency of Richard not having a younger child or children, to be divided equally amongst his the said testator's younger children, namely, William Ponsonby, George Ponsonby, and Mary Elizabeth, the wife of Earl Grey, and Frederick Ponsonby; and after further reciting, that the testator was seised in fee of the fourteen towns and lands situate in the county of Cork, and excepted and reserved out of the settlements of 1769 and 1803 respectively, and also reciting that he was seised in fee of the estate of Bishops Court, with Clarke Paddock, and of a freehold interest in the lands of Oughterard, in the county of Kildare, and that he was seised in fee of an undivided moiety of an estate in the county of Londonderry, the testator devised the said several lands, situate in the county of Cork, to trustees, upon trust, out of the rents and profits of the said lands to pay to the testator's wife, Louisa Lady Ponsonby, an annuity of 400 *l.*, in addition to the jointure provided for her by her marriage settlement, and a principal sum of 600 *l.*, to be paid to her upon the day after his decease; and he devised his estate of Bishops Court, and the other premises before-mentioned, of which he was seised in the county of Kildare, to his wife for the term of her life, and after her decease to his eldest son, John Brabazon Ponsonby, and his heirs, subject to the payment of a sum of 20,000 *l.* to the testator's fourth son, George Ponsonby, which he thereby charged on said Bishops Court estate, with interest for the same at the rate of 5 *l.* per cent. from the day of the death of his wife: and the testator, by his will, devised to his said eldest son his said county of Cork estate, meaning

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thereby the fourteen townlands in the will mentioned, subject to the incumbrances then chargeable thereon, and to the payment of all such debts as he the testator should owe at the time of his death; and also if his wife, Lady Louisa, should survive him, to pay to George Ponsonby 1,000*l.* yearly during the life of his wife, with power to the said George to levy the same by distress, &c.; and he devised his estate in the county of Londonderry to his second son, William Ponsonby, upon a condition in the will mentioned; and after certain other bequests and directions he did thereby direct that his house in Henrietta-street should be sold, and that the money arising therefrom should be applied towards payment of his said debts; and all the residue of his property the testator bequeathed to persons named Peter Metge and Dennis Bowes Daly, for the purpose of being sold, and the money arising therefrom to be applied towards payment of his debts, in case of his real estates; and the testator appointed his wife, the said Louisa, sole executrix of his will, and by a paragraph added to the will, immediately before execution and publication, as a further provision for the Respondent, Frederick Ponsonby, bequeathed to him a sum of 10,000*l.*, to be paid out of the estate in the county of Cork, which he thereby charged with the payment thereof, with interest at the rate of 5*l.* per cent. from the day of his decease.

The testator, W. B. Ponsonby, was created Baron Ponsonby early in the year 1806, and died on the 5th of November in that year, leaving the Respondent, John Brabazon Lord Ponsonby, his eldest son and heir.

Upon the death of the said William Brabazon Lord Ponsonby, his widow entered into possession of the

Bishops Court estate, as tenant for life under his will, and held the same till her death: and the present Lord entered into possession of the fourteen townlands in the county of Cork, purported to be charged by his father's will as aforesaid; and William Ponsonby entered into possession of the devised estates in the county of Londonderry. By indenture of assignment, dated 10th June 1812, being the settlement made on the marriage of George Ponsonby, the fourth son of the testator, with Diana Julietta Margareta Bouverie, the legacy of 20,000 *l.*, and all interest to grow due thereon, were assigned to the Appellants, upon certain trusts declared in that indenture.

On the 11th September 1813, Frederick Ponsonby filed his bill in the Court of Chancery in Ireland against the present Lord Ponsonby (one of the Respondents), and others, praying that the trusts of the will of the testator, William Brabazon Lord Ponsonby, might be carried into execution, and that the present Lord Ponsonby might be obliged to make his election, whether he would abide by the will of his father, and permit the whole of the fourteen townlands in the county of Cork, or a competent part thereof, to be sold for payment of the debts, legacies, and annuities, charged thereon by his father, or whether he would claim any part of them adversely to the said will, and that the Respondent, Lord Ponsonby, and all persons claiming by or under him, might be for ever bound by such election; and in case he should elect to take the reversion of the estate and lands in the county of Kildare, expectant on his mother's death, that his, the plaintiff's legacy of 10,000 *l.* and the interest thereof, might be decreed well charged on the fourteen townlands, and that the same, and all other incumbrances charged thereon by the testator's will, might be raised by sale

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of the whole or a competent part of the fourteen townlands, and have priority to any debts or incumbrances of the testator: and on the other hand, if Lord Ponsonby should make his election to claim any part of the several townlands adversely to his father's will, that in such case the plaintiff's legacy of 10,000*l.* might be decreed well charged on such of the fourteen townlands as should appear liable to the debts and legacies of the testator, the late Lord; and that so much of the debts and legacies as the same should not be sufficient to pay, might be deemed charges upon the reversion of the estate and lands in the county of Kildare; and that such of the fourteen townlands as were liable to debts and legacies, might be sold for payment thereof, and in case of deficiency, that the reversionary estate and lands in the county of Kildare, or a competent part thereof, might be sold to make up such deficiency, and that all necessary accounts for the purpose might be directed and taken, and in particular an account of the plaintiff's legacy of 10,000*l.*, and of the sum due to him on account of his proportion of the sum of 8,000 *l.* under the settlement of 6th December 1769, and that the same might be raised by sale of a part of the estates comprised in that settlement.

Lord Ponsonby, by his answer, elected to take under the will, preferring the reversion of the Bishop's Court estate, and other lands in the county of Kildare expectant on his mother's decease, together with the other property devised to him by the will, to any interest he might otherwise have in the fourteen townlands; and he thereby consented, in order to make his election the more decisive, that the fourteen townlands, or a competent part of them, should be sold for payment of the plaintiff's demand, and all other legacies, annual

ties, and debts charged thereon or otherwise affecting the same.

On the 9th March 1814, a decree was made directing an account of the late Lord Ponsonby's debts, &c. and declaring the present Lord bound by the election.

On the 16th December 1814, the Master made a report of the debts, and on the 13th March 1815 an order was made on further directions,—directing payment of the debts and of the legacy of 10,000 £., and ordering a sale of the fourteen towns and lands in Cork for that purpose. A supplemental bill was filed by Frederick Ponsonby on the 4th April 1818, stating that the present Lord had incumbered the lands in Cork, and had thereby divested himself of the power of making a valid election with regard to the seven towns and lands of the first denomination mentioned in the deed of January 1803, without the consent of his creditors, and praying that if the creditors should refuse to release the lands, &c., a competent part of the Kildare estate should be ordered to be sold to make up the deficiency occasioned by the charges now discovered to have been made upon the Cork estate.

The Respondent, Lord Ponsonby, by his answer to the last stated bill, admitted having mortgaged the said seven townlands, and charged them as in the bill stated. By a supplemental decree made on the 22d June 1818, it was ordered (amongst other things) that the decree of the 13th of March 1815 should be confirmed in all respects, except as to the sale of the seven townlands of the second denomination excepted out of the said settlement of January 1803, and afterwards made the subject of the said indenture of February 1803, which lands it was then admitted

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were not subject to the debts and legacies of the testator; and it was ordered that the seven other townlands, those of the first denomination, which were the fee simple estate of the testator, should be forthwith sold for the purposes expressed by the former decree, subject, as to the townlands of Gortcorkeran, to the jointure of 400*l.* a year charged thereon for the Respondent Frances, the wife of the Respondent the Bishop of Derry; and the Respondent Lord Ponsonby having defeated his father's will as to the first seven townlands, and disabled himself from making any valid election with regard thereto, or to the reversion of the Bishop's Court estate, it was decreed, that in case the other seven townlands thereby decreed to be sold should be insufficient to pay off the whole of the debts and legacies of the testator, sought by his will to be charged on the fourteen denominations, that then so much of the debts and legacies, and the interest due thereon, as should remain unpaid after the application of the money to arise from the sale of the lands so decreed to be sold, should be charges upon the Respondent Lord Ponsonby's reversion of and in the said Bishop's Court estate, and the other lands in Kildare; and it was ordered that the same should be raised by sale of that reversion, or a competent part thereof, subject to the use for life by the said will given to the testator's widow, which sale was ordered accordingly, and that any residue of the money to arise from such sale, after payment of the debts, legacies, and costs, should be paid to the parties entitled thereto.

The testator's widow (then Lady Fitzwilliam) died on the 1st September 1824.

The lands were sold, and the net purchase money applied, pursuant to an order dated 15th December

1825, as far as it would go in payment of judgment debts reported due from the testator.

The cause again came before the Lord Chancellor on bill of revivor, and by an order bearing date the 6th of March 1828, made by his Lordship, it was referred to Mr. Connor, one of the Masters, to take an account of the debts of the said testator proved and reported, and which remained unpaid, and to report the priority of such debts, and whether any and what sums remained due to the said George Ponsonby on account of his said legacy of 20,000*l.*, and the priority thereof, and out of what fund the same was payable; and it was further ordered that the Master should inquire, whether it would be necessary that the Bishop's Court estate should be sold forthwith, and before he should have made his report, and if so, it was ordered that he should proceed to a sale of that estate accordingly. Under this order of reference the Appellants went in before the Master upon the inquiry as to the 20,000*l.*, and the Respondent and other creditors also carried in their claims.

Mr. Connor made a separate report under the last stated order, dated 29th November 1828, finding that it would be necessary that the said Bishop's Court estate (which was inferior in value to the amount of the charges and incumbrances appearing to affect it) should be sold prior to making his report on the other matters referred to him; and by his further report, dated 27th June 1831, he found that the Bishop's Court estate was sold on the 9th November 1829, pursuant to his separate report, for the sum of 38,000*l.*; and he further found that there remained due to the several persons thereafter named the several sums thereafter stated on account of the several debts and legacies of the testator, after the

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application of the purchase money of the seven town-lands sold as aforesaid, and that the several debts and legacies of the testator thereafter specified were incumbrances affecting the residue of the estates of the testator, according to the order and priority thereafter set forth; the Master then stated the several judgment and bond debts (including 19,384*l.* 12*s.* 5*d.* due on bonds to the Respondent the Earl of Norbury) remaining due from the said testator, and the Master then stated, that there was due to the Appellants, as trustees under the settlement of George Ponsonby, the sum of 24,717*l.* 18*s.* 8*d.* on account of the said legacy of 20,000 *l.*, and that the same was a charge affecting the said Bishop's Court estate, and was next in priority after payment of the said several judgment and bond debts. The said Master then stated the several simple contract debts remaining unpaid.

The Appellants filed objections to the last report on the ground that the said Master ought to have found that the said sum of 24,717*l.* 18*s.* 8*d.* was a charge affecting the said Bishop's Court estate prior to and in exclusion of the said several judgment and bond debts. These objections were argued before the Lord Chancellor of Ireland, who, by an order of the 12th November 1831, overruled the objections. This order was the subject of the present appeal.

By an order, dated 11th February 1832, it was referred to Master Connor, to report the funds in the bank to the credit of the cause, which report was made on the 20th of that month, and by a further order, dated 5th March 1832, payment was made according to the allocation of claims made in the preceding report.

By an order, made on the same day by the Master of the Rolls, the carriage of the decree in the said cause,

and of the proceedings thereunder, was given to the Respondent the Earl of Norbury, a reported creditor in the cause.

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On the 11th of February 1834 the Appellants presented their petition of appeal against that order of the 12th November 1831, praying that that order might be reversed, and that the sum stated in the report of the 27th of June 1831, as due to the Appellants in respect of the legacy or charge of 20,000 l. and the interest thereof, might be declared as against all persons parties to, or who had come in under and taken the benefit of the several decrees and proceedings in the said causes or any of them, a charge upon the said Bishop's Court estate and the other lands in the county of Kildare, devised by the will of the testator, William Brabazon Baron Ponsonby, deceased, prior to the several and respective judgment debts and debts upon bond or other speciality which had been proved in the said causes, or either of them, and which remained unpaid at the date of the same report; or that such report might be sent back to be reviewed so far as related to the priority thereby assigned to the said legacy or charge of 20,000 l. and the interest thereof.

Mr. *Tinney* and Mr. *Lloyd* for the Appellants:—  
This is not a creditor's suit, a fact which must be borne in mind throughout the argument. In all cases where the testator is seised of real estate, the creditors have two sorts of remedies respecting it. They may claim under the will and seek payment of their debts under the devise made by the testator for that purpose, or they may claim paramount to the will, in which latter course of proceeding the particular creditors here would come in under the Irish statute of fraudulent



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devises, passed in the reign of Queen Anne, which corresponds exactly with the English statute of fraudulent devises, 3 William & Mary, c. 14. If the creditors claim under the will, they cannot touch any estate of which the testator died seised, and which is not expressly given for the payment of his debts. They must be confined to proceeding against those only which he charged with payment of the debts. If they mean to claim paramount to the will, that claim should be distinctly stated in the proceedings. It is not so stated in this suit, and therefore cannot govern the decree of the Court. The plaintiff in the original suit was Frederick Ponsonby, and the object of the suit was to raise the legacy of 10,000*l.*, granted by the will to him. The Master, therefore, has gone out of the suit in making this report in favour of the creditors. It has never been contended, that the parties coming in under this suit are able to touch the Londonderry estate. Then why should they be able to charge the Kildare estate, and especially to make their claims a charge prior in rank to one which, by the will, is expressly imposed upon it? The original decree of March 1814 simply directed that the will of Lord Ponsonby should be carried into execution. A subsequent proceeding in the same suit cannot extend the effect of that decree to what it was never intended to touch. The decree establishing the election of the present lord to take under the will made both the denominations of the Cork estate subject to the payment of debts. There is no principle of equity which, while supporting the will, can make other estates, besides those charged in it with the payment of debts, also liable to such payment, and liable too in the first instance. The object of the supplemental bill was to vary that decree, so far as related to the election of

the present lord, in having disabled himself from making the required election in a full and ample manner, and the decree made on the hearing of the supplemental bill was to this effect, that the second seven denominations of the Cork estate were not liable to the payment of the testator's debts, but that a competent part of the estates possessed by the testator in fee simple, should be sold for that purpose. Then came the reference to the Master, who made the order now appealed against. The objections taken to the order are not merely of a technical nature, but involve the question of the mode of administering assets in equity. The foundation of the claim of the Respondents is in the Irish statute of fraudulent devises (4 Anne), the words of which are the same as those of the 3 William & Mary, c. 14, ss. 2 & 3. By that statute devises made to defeat the claims of creditors are to be void as against them, and they are to have power to go against the heir or devisees. But then the question arises, whether creditors are to go against one particular devisee and not against the rest, and so deprive one of the benefit of the will and leave the other in full possession of all its advantages.—[Lord Brougham: The words "devisee and devisees," are used in the Act. The first word refers to cases where there is one devisee, the other to those where there are more devisees.]—There is no case directly decided on the words of this statute; but the principle on which a court of equity proceeds is distinctly stated in *Knight v. Knight* (a), where it was decreed that though the creditor may sue the heir only where the heir is expressly bound, yet as the personal estate is the natural fund to pay all debts, and as the

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(a) 3 P. Williams, 331.

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executor must make it appear that he has performed all the covenants of the testator, a covenantor must join the executor with the heir in a suit brought upon a covenant in which the testator had bound himself and his heirs; and Lord Chancellor Talbot there observed, that "Equity delights to do complete justice, and not to do it by halves, as first to make a decree against the heir and then to leave him a suit against the executor." This is the principle on which courts of equity administer assets; that principle must be adopted here; and an order which selects a particular estate as primarily liable to the debts of the testator when he possessed other estates, and when the selection would affect the rights of a particular legatee, cannot be supported. It would be making a decree against one party and then leaving him a suit in equity against another. The principle stated by Lord Talbot is recognised in *Madox v. Jackson* (b), where Lord Hardwicke said, "The general rule of the Court is, that where a debt is joint and several, the plaintiff must bring each of the debtors before the Court, because they are entitled to the assistance of each other in taking the account." That is precisely the case here, and the order ought not to have been made without other parties being brought before the Court. There is an objection to the order too upon the statute against fraudulent devises; so that whether it is set up as a proceeding by parties taking under or against the will, it is equally invalid. The fifth section of that statute declares that a *bond fide* alienation, made before a suit brought, shall be relieved from liability to payment of the testator's debts. Here there was an assignment of this claim to the Appel-

(b) 3 Atkins 406.

lants as trustees, on a good consideration, the consideration of marriage, on the 10th of June 1812; and the bill here was not filed till the 10th December 1813. Under this statute, therefore, the estate on which the charge vested in them is imposed, is altogether relieved from the claims of the Respondents.

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... Mr. *Knight* and Mr. *Parry* for the Respondents:—  
 The Bishop's Court estate is like all the rest of the testator's property, primarily liable for the testator's debts before it can be applied to any other purpose. If the legatee had wished to obtain this estate in satisfaction of his legacy, there is but one way of his doing so; he must first pay all the testator's debts. In a case, therefore, where it is admitted that the testator died indebted, the Court was bound to direct an account of the debts; and if the estate on which they were specifically charged was not sufficient to meet them, the Court was then bound to direct that other estates should be held liable to their payment before those other estates were applied to the payment of mere legacies. The creditors are entitled to payment at all events, and must be paid, whether under the will or under the statute, and whether they are the plaintiffs in the original suit, or come in under it. In a bill for administering the trusts of a will, the Court is not bound to administer those trusts exactly as they are found in the will. Every such bill is necessarily a bill for the payment of debts, and the trusts cannot be carried into execution till the debts are paid. By the order of the 6th March 1828, which is unappealed from, the very question now brought before this House was expressly raised, for by that order the Master is directed to report the priority of the debts, and whether any sum was due to George Pon-

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sonby on account of the legacy of 20,000*L.*, and whether the Bishop's Court estate should be sold forthwith. The necessary effect of reporting (if the Master had so reported) that the legacy was prior to the bond debts, would be to entitle the legatee to take the purchase money of the Bishop's Court estate out of Court, and leave the creditors to get payment how they could. The opposite result would not necessarily follow from the report as it stands, for if the Court below sees reason to do so, it may still examine what other assets there are for the payment of creditors before taking possession of these estates for that purpose. The Appellants here are too late with their appeal, for they have allowed nearly three years to elapse without appealing, and many things have been done in the mean time founded upon the order against which they have at last thought fit to appeal. A court of equity, and this House is now sitting in that capacity, will not allow of such delay on the part of an appellant. It is quite clear on every ground that the order is sustainable, and the appeal ought to be dismissed with costs.

Mr. *Tinney*, in reply:—The substance of this appeal is, whether creditors who have a large personal estate to resort to, can come in under this suit and insist upon payment out of this particular estate.—[The Earl of *Devon*: I do not think that that is the question which we have now to consider; the real point is on the abstract opinion of the Master relative to the priority of the debts or the legacy.]—That is the question in point of form, but it cannot well be decided without the other question being first determined. This was not necessarily, nor otherwise, a suit for the administration of the assets of the testa-

tor. The suit was merely that the trusts of the will might be carried into execution. A judgment or a bond creditor would not be bound by such a suit, but might take the estate in spite of the will; he cannot therefore be allowed the same advantage as in a suit in which he would be bound by the course of the proceedings.—[Lord *Brougham*: In any suit of this sort the bond creditors may come in as if the suit was their own.]—They could not not do so here, for all depends on the form of the suit.—[Lord *Brougham*: Then the result would be that the proceedings in the suit must be stopped, to enable another suit to be instituted and the creditors to come in.]—In that case the Londonderry estate and the Henrietta-street estate would be brought into the account, neither of which is touched by the present suit or the order now the subject of appeal; it is impossible to carry on the purposes of the will without having all the estates brought into the account; the creditors are bound to get all the property administered, and the Court will not suffer them to select what property they please for payment of their own debts. The legatee has not been guilty of laches; he had no right to complain till the last order, the order for payment, was made; till then he was not affected by the report. The direction to sell the reversion here must be construed in the same manner as a direction to sell an estate with a mortgage upon it; the estate may be sold, but it will be subject to a claim in respect of the mortgage. The supplemental decree states that so much of the debts, legacies and interest as should be found to be due should be decreed to be a charge and incumbrance on Lord Ponsonby's reversion in the Bishop's Court estate; that means his reversion after the payment of the charge of 20,000 *l*. What is

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to be satisfied out of the estates directed to be sold.  
 The legacies and charges upon the Cork estate. Yet it is now in substance argued, that these legacies and charges may be satisfied out of the reversion of the Kildare estate. To make this estate liable to the order, there must be a suit for the general administration of assets.—[The Earl of *Devon*: Does not the order of the 6th March 1828 show that this is a suit for the administration of assets?—No, it does not amount to that.—[Lord *Brougham*: It directs that an account shall be taken of legacies and debts, and that the Master shall then proceed to a sale of the estate.]—But that order has reference entirely to the Bishop's Court estate, and was made upon the death of the tenant for life, for the purpose of ascertaining the particular charges on that estate, and not for any other purpose. Suppose that this was the case of an ordinary mortgagee, and an order of this kind had been made, that would not interfere with his priority as mortgagee. The legatee here is the prior incumbrancer and stands in the same situation as the mortgagee. The testator's debts were charged originally on the Cork estate. They are now charged by substitution on the Kildare estate; but that substitution cannot take effect till a prior charge on that particular estate has been satisfied. The substitution cannot in this way be made a prior charge. There are not in this suit parties sufficient to justify the Court in doing what it has done.—[The Earl of *Devon*: Can you object to want of parties upon exceptions to the Master's report?—Yes, there was a case (c) at the last sittings at the Rolls bearing upon this subject. It was a question on proving a legacy before the

(c) We have not been able to learn the name of the case.

Master. The legacy was given by two distinct instruments. The Master reported that there was but one legacy. The defendant, the party claiming the legacy, had died before the Master made this report. The case then came on for further directions and distribution, and the Master of the Rolls said that he could not direct a distribution of the whole property in the absence of the representatives of the party that had died, and he directed a fund to be set apart equal to both the legacies claimed by that party.—[The Earl of *Devon*: That case is not in point.]—But it shows the rule on which courts of equity proceed. Now, as to the statute of fraudulent devises; suppose that this, instead of being a mere equitable estate, had been a devise to trustees to raise the 20,000*l.*, the estate in fee would have been given them for that purpose, and on the marriage settlement of George Ponsonby they would have conveyed over; that would have been an alienation before a creditor's suit, and would have been an answer to the application of the provisions of the statute. The assignment to the trustees of this charge is equally an alienation that renders the statute inapplicable. [Lord *Brougham*: But is there not an objection here on the score of lapse of time; this order was made in 1831; you have allowed other things to be done in the mean time, and have not appealed till 1834].—The laches of lying by for two years is not sufficient to deprive a man of a right. We did not allow the funds to be distributed, but appealed when the order for distribution was made; that was, at the first moment that the report of the Master was about to be put into operation.

The Earl of *Devon*:—My Lords, this was a case heard before Lord Brougham and myself; we have

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consulted together on the subject, and the opinion which I have formed, and am about to state to your Lordships, has his full concurrence. This was a case of considerable importance in point of amount, but the point raised in it was a very short one. It was an appeal from an order of the Lord Chancellor of Ireland on an application made, in the form of a motion, to set aside or to review a finding by one of the Masters of the Court of Chancery of Ireland, and the simple question was, whether the Master was right in the conclusion to which he had come upon the inquiry directed before him. The case originally was a suit for legatees, and it is not necessary to repeat the statement of the earlier proceedings in the cause. The duty of the Master depended on the terms of the reference made to him by the Court; he was directed to make a certain inquiry, and the only question is, whether he has answered that inquiry correctly? The reference to him was in these terms. [His Lordship read the terms of the order of reference and of the finding by the Master upon that reference, see *ante*, p. 257.] The persons who objected to this finding, did so, and went before the Court to vary it or set it aside, on the ground that the Master ought to have declared that the legacy was a charge prior to the debts, and that it had not been satisfied. The question was, whether the Master was right in finding that this legacy was a charge after the debts? We are of opinion that the Master was right in his finding. His duty depended on the terms of the reference made to him, and we think he has fulfilled that duty. It was argued at the bar that this was not a suit for the administration of general assets, but that the 20,000 *l.* legacy was to be paid out of the particular estate, which therefore was in the first

instance liable to satisfy this charge; and till that charge was satisfied, it was liable to no other. But it appears to us that there is no principle on which it can be contended that the judgment and bond debts of the testator are not a lien and a charge upon this particular estate, in preference to any charge in the way of legacy that he may have created upon it; and if he had still continued in possession of this estate, such judgment and bond debts would have had a priority of charge upon it in preference to any such charge or legacy. His own directions cannot alter this state of things. In the further progress of the cause the Court below may find it necessary to say that the creditors who have charges upon other estates as well as upon this, shall in the first instance be paid out of those other estates, in order that no persons may be disappointed, and that the legacies which are charged upon one particular estate, may be, if possible, satisfied out of that estate; but with that the Master had nothing to do. That is what the Court may or may not think proper to be done in any subsequent stage of the cause. The only question for the Master was, whether this particular legacy had a priority over other charges with respect to this particular estate. We think that he was right in saying that there was such a priority; we are therefore of opinion that the order of the Lord Chancellor was correct, and that that order must be confirmed, and the appeal from it be dismissed; and we think this so clear that we recommend that the appeal should be dismissed with costs.

Order of the Court below affirmed accordingly.

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## APPEAL

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FROM THE COURT OF EXCHEQUER IN EQUITY.

March 23. 27. The Most Honourable HENRY DE LA }  
 POER, Marquis of WATERFORD - - } *Appellant.*

The Rev. THOMAS KNIGHT, Clerk - - *Respondent.*

*Practice.*  
*Supplemental*  
*Bill for Dis-*  
*covery.*

A Plaintiff filed a Bill in the Court of Exchequer for an account of tithes, and for discovery and relief. The Defendant, being an infant, put in his answer by his guardian. The answer set up an immemorial payment in lieu of tithes, but did not make the required discovery. By the practice of the Court of Exchequer in Equity, the answer of an infant cannot be excepted to for insufficiency. When the Defendant came of age, the Plaintiff filed a Supplemental Bill against him, alleging the existence of new facts, and praying for discovery and relief. HELD that such Bill could be supported.

THIS was a bill filed in Trinity Term, 1830, by the Respondent, who is the rector of the rectory and parish of Ford, in the county of Northumberland. The bill sought for an account of tithes claimed by the Respondent, in respect of the lands within the rectory, manor and parish of Ford. The Appellant is the lord of the manor, and also an occupier of land within the rectory. The bill also alleged that the Appellant had in his custody or power certain deeds, instruments, papers, receipts, &c., relating to the tithes of the parish of Ford; and it sought a discovery of the same from the Appellant.

The Appellant, on the 19th of February 1831, being then an infant, by his guardian put in an answer

to the said bill, by which it was alleged that, the parish of Ford comprised within its bounds, amongst other lands, the manor of Ford; that the lord of the manor of Ford, had from time whereof the memory of man was not to the contrary, paid, by equal half-yearly payments, at Lady-day and Michaelmas-day, to the parson of the parish of Ford, the yearly sum of 40 l., for the maintenance of Divine service there, and for and in lieu and contentation of all manner of tithes arising within the said manor of Ford; and that the lord of the manor of Ford had always from time immemorial used, in respect of the said yearly sum of 40 l. to have, and of right ought to have, the tithes arising within the said manor of Ford. The answer made no discovery upon the subject of the deeds, &c., mentioned in the bill. By the practice of the Court of Exchequer, the Respondent was precluded from taking exceptions to the answer of the Appellant, on the ground that he was an infant. The Appellant attained 21 about April 1832, and in Hilary term, 1833, the Respondent filed a supplemental bill against him for a discovery of the matters not noticed in the original answer put in by the Appellant. That bill set forth the former proceedings, and referred to the allegations and prayer of the original bill, and to the answer filed thereto.

The supplemental bill further stated, that the Respondent had lately discovered that in times past the lords of the manor of Ford, who were patrons of the rectory, and under whom the Appellant claimed, used, upon presenting to the rectory, to require and take from the person about to be presented a penal bond that he would not demand or take the tithes arising from the farm and lands within the manor of Ford, but would take and accept a sum of 40 l., or some

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such sum, as and for a satisfaction for the tithes, or that they used to take some bond to some such effect; and that the Respondent had also discovered, that in time past the rectors of the parish of Ford, when no such bond as last-mentioned was given, used, upon or soon after their induction, to make or grant a lease to the then lords of the manor of Ford of all the tithes of all titheable matters arising upon or from the farms and lands within the manor of Ford; and that the sum of 40 *l.* a year, or some such annual sum, was the rent reserved in such leases, to be paid half-yearly to the rector by the lord; or some lease to some such effect were made by some of the former rectors of the parish to some former lords of the manor; or there were some instruments or agreements in writing, whereby the sum of 40 *l.* was fixed as the whole amount to be received by the rectors from the lords for the tithes of such lands as aforesaid, within the manor of Ford, or for some tithes within the parish of Ford; and that the Respondent was advised and believed that the payment of 40 *l.*, in the answer of the Appellant stated to be an immemorial customary payment, in fact had its origin in such bonds and leases or other instruments or agreements as were thereinbefore mentioned. And it was further stated, that the Respondent had lately learnt that in or about the year 1573 there was a claim made in respect of the tithes arising within the manor of Ford, by the then rector of the parish of Ford, by name William Bradforth, against William Carr, the then lord of the manor, and that a suit was instituted by the said William Bradforth against the said William Carr in respect thereof, and that the same was heard before the Council in the town of Berwick-upon-Tweed; and that on or about the 14th October 1573, a decree

or decretal order was made, and entered in the books of the council of the town, and by which all controversies between the said parties were directed to abide the arbitration of certain persons therein named; and that some award or arbitrament was duly made, by which it would appear that no such sum as 40*l.* had been immemorially paid by the lords of the manor of Ford to the rector of the parish of Ford, in lieu of tithes, as was alleged by the Appellant, or by which it would appear that tithes in kind were then and now are due to the rector of Ford from the owners and occupiers of land within the manor of Ford. And that the Respondent had caused diligent search to be made in and amongst his deeds and papers, and also amongst the records kept at Berwick aforesaid, and elsewhere, to endeavour to discover the original of the award or arbitrament, or some copy thereof, but that he had failed to find the same or any copy thereof, nor was it or any copy of it amongst his deeds, papers or writings; and that the Respondent had lately discovered that the Appellant had the award and arbitrament in his custody, possession or power, or some copy of, or extract from, the same. And the supplemental bill further stated, that within the parish of Ford there was a district or portion of land, consisting of about 600 acres, and called or known by the name of the Catford Law or Hay Farm, which formerly belonged to the lords of the manor of Ford, and was part and parcel of the manor of Ford, and was held by the lords of the manor as part and parcel thereof; but that the Respondent had lately discovered that some time between the year 1598 and the year 1660, or at some time thereabouts, the then lord of the manor of Ford, sold the district or portion of land called Catford Law to one of the family of the Carrs of Etall,

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and that the same had ever since remained and then was held by the family of the Carrs of Etall; and that the owners and occupiers of the land comprising the district called Catford Law or Hay Farm, and of every part thereof, had, ever since the aforesaid sale thereof, paid tithes of all titheable matters and things had and taken by them from their said lands, to the rector of the parish of Ford; and that within the parish of Ford there was a portion of land or district called or known by the name of Heatherslaw, and which then belonged to the Appellant, and formed part of the lands in respect of which he claimed that the sum of 40*l.* was payable in lieu of tithes; and that the Respondent had lately discovered that the district of Heatherslaw was formerly a manor of itself, and was not part or parcel of the manor of Ford, and did not belong to the lords of the manor of Ford, but belonged to some other person or persons, whose names were not known to the Respondent, before it became the property of the lords of the manor of Ford; and that tithes in kind were always paid by the tenant of the lands in Heatherslaw aforesaid to the rectors of Ford for the time being, until some time between the years 1685 and 1717, when Francis Blake, or Sir Francis Blake, *knt.*, the then lord of the manor of Ford, purchased the said manor of Heatherslaw of the then owner thereof, whose name was also unknown to the Respondent; after which time, and not before, the tithes of the land within Heatherslaw aforesaid were introduced into and included in the aforesaid bonds, leases or instruments whereby the said sum of 40*l.* was received by the rectors of Ford, in lieu of the tithes of the lands the property of the lords of Ford, and that the district of Heatherslaw was not, nor ever had been, part of the manor of Ford. And

the supplemental bill further stated, that the Respondent had lately discovered that the Appellant had, at the time of filing the supplemental bill, in his possession, custody or power divers of the bonds and leases, or other instruments or agreements in writing thereinbefore mentioned; and had also divers old deeds, instruments and writings, whereby it would appear that the district called Catford Law formed part of the manor of Ford, and that the Appellant had also the deeds of conveyance of Catford Law, which were executed on the occasion of the sale thereof thereinbefore mentioned; and that he had also divers deeds, instruments and writings, whereby it would appear that the district called Heatherslaw was a manor of itself, and was not part of the manor of Ford, and that tithes in kind were formerly paid for lands within Heatherslaw; and that the Appellant had also the deeds of conveyance of the district called Heatherslaw, by which it would appear that Catford Law, otherwise Hay Farm, formed part of the manor of Ford, and that the district called Heatherslaw was not part of the manor of Ford; and that the Appellant had also in his possession, custody or power, divers other deeds, &c., whereby it would appear that the sum of 40 *l.* had not been immemorially paid by the lords of the manor of Ford to the rectors of the parish of Ford, in lieu and contentation of all manner of tithes arising within the manor of Ford, or which in some way tended to show the Respondent's title to tithes in kind within the manor of Ford. And the supplemental bill prayed in the usual manner for a discovery.

The Appellant, on the 21st of February 1833, put in a demurrer to the supplemental bill, on the ground that the Respondent was not in equity entitled to the

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discovery sought for by the said supplemental bill from the Appellant, or to any part of such discovery.

The demurrer was heard on the 4th day of May 1833, before Lord Lyndhurst, Lord Chief Baron, when his lordship over-ruled the same. This was an appeal against that decision.

Mr. *Swanston* and Mr. *Purvis* for the Appellant:—  
 The supplemental bill here cannot be supported. It would be objectionable if it was a bill filed for a discovery from an adult defendant, for it is a demand for a discovery of the rights of the defendant rather than of those of the plaintiff. It is still more objectionable as a bill against an infant. The rules of practice in suits where infants are defendants are well known and fully established, and no new rule of practice can be introduced as to them merely by analogy to suits between adults. The plaintiff, by this bill, asks for a discovery of such things as were not answered to his satisfaction in the original bill. This cannot be done. Even if he has any right to maintain the bill at all, it must be solely in respect of things which have occurred since the filing of the first bill, or at least which have since come to his knowledge, and which he could not know before. What would be the practice of the Court with regard to issuing an attachment against an infant for not answering? It has always been to favour them as much as possible. The rule as to such cases was laid down by Lord Hardwicke in *Huggins v. Alexander* (a), where an infant being in contempt to an attachment for want of an answer, upon production of the attachment a messenger was ordered to bring the infant into Court, though the attachment had not

(a) 1 West, 131.

been served, and the time was not out, the practice being not to serve an attachment upon an infant, but to bring him into Court for his protection and advantage. In *Perkins v. Hamond* (b), Lord Hardwicke said that an infant could not be kept in custody after a guardian had been assigned him, and that an infant defendant paid no costs of a contempt, but that the plaintiff always paid the messenger.—[Lord *Brougham*: The principles relating to infants' answers were much discussed in *Kelsall v. Kelsall* (c), where it was decided that an infant defendant who had answered had the privilege, on coming of age, to put in a new answer, stating a different case, and going into evidence to support it.]—That case is another example of the favour with which infant defendants are treated by the Court, and it shows the practice of the Court to be, that an infant defendant is not bound by his answer, but may adopt or reject it on his coming of age. Where an infant is defendant, the answer is sworn by the guardian, and the subpœna to bring in the answer is directed to him, and so is the subpœna to hear the judgment, *Taylor v. Attwood* (d); and the answer of an infant, sworn to by his guardian, is not conclusive against him at law or in equity, not even after he had attained his majority, *Eccleston v. Petty* or *Speke* (e). In *Lucas v. Lucas* (f) it was held, in Chancery, that on exceptions could be taken to the answer of an infant, but that the cause must be decided on the merits; and though the answer there, if it had been filed by an adult defendant, would have been deemed insufficient, it was acted on by the Court, and an injunction previously obtained was dissolved. If the

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(b) 1 Dick. 287.

(e) Carthw., 73; 3 Mod. 259.

(c) 2 Myl. & Keen, 409.

(f) 13 Ves. 274.

(d) 2 P. Wms. 643.

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answer is not sufficient for the plaintiff's purposes, and if the plaintiff himself fails in proving his own case, the bill, in the case of an infant, must be dismissed; it cannot stand over. The plaintiff here seeks to possess himself of all the advantages of a double suit by this supplemental bill. He must assert, or he will prove nothing, that he has a right, not to supply a defective answer by this bill, but a right, by a supplemental bill, to obtain an answer to an original bill. All the authorities are against such a proposition.—[Lord *Brougham*: Is the supplemental bill here the same as the original bill?—It is, with the mere addition of the statement that the defendant has attained his majority. There are two passages in Mitford on Equity Pleading (g) which show that what is now attempted cannot be done. In the first of these that learned writer says, "Where the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely." Again: "When any event happens subsequent to the time of filing an original bill, which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, or a new interest to a party, as the happening of some other contingency, the defect may be supplied by a bill, which is usually called a supplemental bill." He then puts other cases, and proceeds: "In all these cases the parties to the suit are able to proceed in it to a certain extent, though, from the defect arising from the event subsequent to the filing of the original bill, the proceedings are not sufficient

to attain their full object." That is not the case here. There was no defect on the face of this record at the time when the record came into existence, and the defendant was at that time entitled to ask for a dismissal of the bill. There is a third passage in the book just quoted, where it is said (*h*), "If any event happens which alters the interest of any party, or gives any new interest to any person not a party, the plaintiff may file a supplemental bill, or bill of revivor, as the occasion may require; and if the plaintiff thinks some discovery from the defendant, which he has not obtained, is necessary to support his case, he may file a supplemental bill to obtain that discovery." This last appears an extensive and unqualified proposition, but it occurs after the learned author had again and again explained the restrictions under which supplemental bills might be filed; and the proposition must therefore be taken subject to those restrictions.—[Lord *Brougham*: I see that the view taken of this case by Lord Lyndhurst in the Court below was this: Why do you come into equity for a discovery at all? Because the want of it, which the law cannot supply, would work a failure of justice; for this purpose equity is auxiliary to law, and affords relief, of which otherwise the party justly entitled to it would be deprived. That is the governing principle. Is it not a consequence of this principle, that if circumstances arise which show that the discovery has not been obtained and could not be compelled under the original bill, you may file a supplemental bill for the same reason for which you filed the original bill, namely, that otherwise there would be a failure of justice? The answer obtained from an

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infant may be just as useless as if it had been an insufficient answer obtained from an adult. Against the adult you could file a supplemental bill; why should you not have the same remedy against the infant when he comes of age, and compel him to give an answer that may be read against him? Is there not the same reason and the same necessity for it, namely, as Lord Lyndhurst said, "to prevent a failure of justice at law?"—The original bill was not for a discovery, but was a mere tithe suit, and no such bill could be filed against an infant, for on putting in an answer stating that he was an infant, he would be entitled to the costs of the bill. Besides, there cannot be a supplemental bill of discovery. It was admitted here in the judgment, that the plaintiff could not, according to the authority of *Usborn v. Baker*, (i) be entitled to an answer to such parts of the supplemental bill as were not contained in the original bill; how then could he be entitled to an answer to such parts as were contained there, and which had already been answered; and how could he be entitled to have the demurrer to his supplemental bill overruled. The case of *Boeve v. Skipwith* (k) certainly will not support the present case, nor does that of *Goodwin v. Goodwin* (l), where the sole question was as to the right to introduce new matter upon an amended bill. In *Usborn v. Baker* it was at first urged that there was in truth no such thing as a supplemental bill of discovery, but on the authority of the passages in Lord Redesdale's book on pleading, that argument was overruled, and it was said, that where the object of the suit could not be obtained by an amendment of the original bill, a supplemental bill might be filed. No

(i) 2 Madd. 379.

(k) 2 Rep. in Chan. 75.

(l) 3 Atk. 370.

such allegation can be made with respect to the present case, nor can it be said that any of the circumstances referred to in Lord Redesdale's book upon pleading have arisen to bring this case within the rules there laid down. This is an attempt to obtain a further answer from the defendant. In that book (*m*) it is said, "a further answer is in every respect similar to, and indeed is considered forming part of, the first answer." Now it is clear that a plaintiff could not compel an adult defendant to give a second answer to the same bill; why then can he do so with respect to an infant defendant? In *Ovey v. Leighton* (*n*) it was held that the plaintiff not having excepted to the answer to an original bill, could not except to one given to a supplemental bill, upon a principle which would have applied equally to the original answer; yet that is what is attempted to be done in the present instance. This case is one of the first impression, and if the doctrine now contended for on the other side should be admitted, will be of the greatest detriment to the practice of the Court, and will subject infant defendants to great vexation. In *Milner v. Lord Harewood* (*o*) it was declared by Lord Chancellor Eldon, that the circumstances stated in a supplemental bill must be not only properly supplemental matter, but must be material to the plaintiff's case. The information here is not shown to be material; and again, the objection occurs, that the discovery demanded is of the defendant's own title by the discovery of the defendant's own documents. It is against the rule of a court of equity to allow of such a discovery, and against its practice to permit it to be made in the way now sought.

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(*m*) P. 256.

(*n*) 2 Sim. & Stu. 234.

(*o*) 17 Ves. 144.

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Mr. Boteler and Mr. Loftus Lowndes for the Respondent:—The Respondent here seeks no more than he would be fully entitled to have, if the defendant had from the beginning of the suit been an adult. The fact that he was, when the bill was filed, an infant, interposed a difficulty in point of form, which, now that he is of age, no longer exists. Is substantial justice to be denied the Respondent, merely because of this form? The only effect of the argument on the other side would be, to get this bill dismissed, and to put both parties to the trouble and expense of a new bill. But the Appellant would gain an unfair advantage thereby, for, by Lord Tenterden's Act, the Appellant would now be barred from commencing a new suit. This injustice ought to be prevented. The cases which show that a plaintiff cannot except to an amended answer, as he did not except to the original answer, cannot apply here, for the forms of the court in this case prevented the plaintiff from taking exceptions to the answer of an infant defendant, and he cannot be punished for the forms of the Court. *Lucas v. Lucas* has been cited to show that the answer of an infant is to be considered sufficient, however insufficient it may be in itself; but there has been another case on that subject, *Meredith v. O'Donovan*, in which a bill was filed against a lady in her infancy, making certain allegations against her. She put in her answer in the usual manner, and an injunction, which had been previously issued, was dissolved. When she came of age a supplemental bill was filed against her, and she answered, without taking objection as to the competency of the bill. It is admitted, that no objection having been taken there, that case is not a direct authority for the present, but it shows that in practice there has been one case analogous to that now under discussion.

Another argument on the other side is, in substance, that when the infant attains 21, he may make a new defence, and therefore his answer, made when an infant, is not to be read against him. That is admitted, and *Kelsall v. Kelsall* (*p*), is a decided authority for that point. But that case does not touch the question involved in the present. This case clearly comes within the rule laid down by Lord Redesdale in his book on equity pleading (*q*), for the suit is here defective, as the plaintiff has not that which he is entitled to, an order to work out his relief; and the imperfection arises "from a defect in the original bill, or in some of the proceedings upon it." The same authority declares (*r*) that "a supplemental bill may be filed to obtain a further discovery from a defendant where the proceedings are in such a state that the original bill cannot be amended for that purpose." This case precisely falls within that description. In *Milner v. Lord Harewood* (*s*), the real objection was, that the supplemental bill was for discovery only. The same was the objection in *Usborn v. Baker* (*t*), and in the first the bill was refused because it did not show the discovery required to be material, and in the last it was allowed on the authority of Lord Redesdale's treatise on equity pleading. In *Colclough v. Evans* (*u*) a supplemental bill was not allowed, but solely for this reason, that it asked for something different from what had been asked in the original bill, and which might have been introduced by amendment into that bill. That is one of the very class of cases referred to by Lord Redesdale. But the subsequent case of *Crompton v. Wombwell* in

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(*p*) 2 Myl. & Keen. 409.

(*q*) P. 48, 49.

(*r*) Id. ib.

(*s*) 17 Ves. 144.

(*t*) 2 Madd. 379.

(*u*) 4 Sim. 76.



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the same volume (x) shows, that where the plaintiff discovered the new matter after the cause was in such a state that he could not amend his bill, he was allowed to file a supplemental bill. There again the rule stated in Lord Redesdale's book was adopted as the ground for the decision of the Court. There is no similarity between this case and one where a further answer is required to the same bill; the objection as to the possibility of creating perjury does not exist, for the defendant was not sworn to the truth of the first answer. The objections here are more of form than of substance. This is said to be a case of the first impression; it is so, but why? because the plaintiff, in a bill like this, is under a disadvantage as to costs, and plaintiffs will not put themselves under such a disadvantage if they can avoid it. That circumstance alone accounts for the fact of there being no precedents for a bill of this sort. Upon the whole, it is clear, that to refuse this bill would be to refuse equity in a case where the plaintiff, except for the intervention of a mere form, had a perfectly good equitable title to relief.

Mr. *Swanston*, in reply :—The absence of authorities cannot be reconciled with the existence of such a privilege as that now claimed by this plaintiff. The established rule of equity, is that in a suit against an infant, the plaintiff has no right to a discovery, but must prove his own case. There were other persons besides the present Appellant who were defendants in the original suit; it would be most unjust to them to keep the suit pending over their heads till this defendant came of age, in order to enable the plaintiff to file a supplemental bill for a discovery against him.

(x) 4 Sim. 628.

He was entitled, and so were they, when he put in his answer, to have the bill dismissed, and the plaintiff, if he seeks a further remedy, must seek it in a new proceeding. *Usborn v. Baker* does not carry the rule to the extent now contended for, but, like the doctrine stated in the last part of Lord Redesdale's treatise, must be taken subject to the limitations stated in the former part of that work.

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Lord *Brougham* :—My Lords ; I shall ask time to consider this case, as it is admitted to be a question perfectly new in practice, and one of first impression, as far as direct decisions on the very same circumstances are concerned, though it can hardly be said to be of first impression with respect to the principle to be derived from a whole current of authorities. It does not by any means follow, because there is no actual case where a bill was filed and answered during infancy, and a supplemental bill was afterwards allowed, that such a practice is never to be permitted ; if the principle is clear, and the particular case is only a new application of the same principle, it does not by any means follow that because there never has been a judicial decision in favour of that application of the principle, the first decision on the point must be against it. There may be no such decisions, because the principle may have been deemed too clear to be debated ; as, for example, it is probable that we might not find any case expressly deciding that a devise to A., with remainder to his heirs, is a fee simple, or with remainder to the heirs of his body, a fee tail. On the other hand, there may have been no case like the present, because it may have been thought that there was no principle justifying such a bill as that now under discussion. The absence

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of authority will not alone decide my opinion on the question. I should wish to examine the matter a little further, and to consult some equity practitioners now on the bench with respect to it.

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March 27.

Lord *Brougham* :—My Lords ; when this case was argued, I stated enough to show that I had a strong feeling in favour of the principle of the decision upon the demurrer in the Court below ; but in order to consider one particular matter, the matter of practice, I moved the postponement of the judgment. It was admitted on all hands that this was the first case directly turning on this point, and that it was therefore a case of the first impression as to decision, although it must frequently have occurred in practice that such bills had been filed. With respect to bills for discovery, the ordinary principle is, that a plaintiff is entitled to a discovery, whether for the purposes of a trial at law, or for relief in equity. Then comes the case of an infant. If I file a bill against an infant, and an answer is put in by his guardian, it is certain that that answer cannot be read against the infant at law, nor in equity, and I should be in so far in the same situation as if no bill whatever had been filed. There was a case in the Court of Common Pleas on this subject. Now, then, shall a party in this case be defeated of his object in obtaining relief, the infant having in the meantime come of age ; or shall he be allowed to file a supplemental bill, stating the facts which came to his knowledge after the answer was put in, and requiring a further answer, and a discovery ? I think he may do so. It happens here that some of the facts stated in this supplemental bill did not exist at the time that the

answer by the infant's guardian was put in, nor till the infant had attained his majority. The demurrer amounts to saying that the party shall not do this, but that he shall be put to begin *de novo*, to file a new bill as if in an entirely new suit. It seems to me that nothing can be more senseless than to make a party under such circumstances submit to have his first bill dismissed, and to refer him to the delay and expense of a new bill, to get an answer to that to which, but for a matter of form, he might have got an answer before. On this principle I think the present case should be decided. It is quite clear from all the cases cited that the principles recognised in them, and adverted to by the text writers,—the work of one of whom, a learned person of the highest eminence, has been referred to,—would warrant the filing of this supplemental bill for a discovery; and as far as the expressions of these text writers apply, they induce the belief that those writers themselves never would have thought of filing a demurrer in a case like the present. In my opinion, this bill is in accordance with all the principles of equity, and the mere novelty of the case, as an objection against it, goes for nothing; it is the application of a well-known principle to facts justifying that application. There is no decision against it, and I think that the real and the dangerous novelty would be the allowance of this demurrer. I have, therefore, no hesitation in moving that the judgment of the Court below be affirmed.

Lord *Lyndhurst* (Lord Chancellor):—If the information on which this plaintiff seeks for a discovery came to him so late that he could not state it in his original bill, he must be entitled to obtain it in a sup-

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plemental bill; this is the ordinary rule. But then we are asked to say that this ordinary rule does not apply to the case of an infant. In the Court of Exchequer the practice of the Court does not permit you to except to the answer of an infant. Is then a party to be without remedy, not only when the defendant is an infant, but after he has attained his majority?— If you do not allow a party then to get an answer as to a fact to which he could not get an answer in his original bill, what will be the consequence? Why he must begin *de novo*. That would be of no benefit to either party, but would be an additional and a useless expense. It is not according to the rules of equity to compel such a practice where it can be fairly avoided; that was the principle on which I decided the case in the first instance, and I am happy to find my own impressions confirmed so fully as they have been by my noble and learned friend.

Judgment affirmed with 100 *l.* costs.

## A P P E A L

FROM THE COURT OF CHANCERY IN IRELAND.

June 1834  
and  
April 1835.

The Right Honourable The LORD MAYOR,  
SHERIFFS, COMMONS and CITIZENS of } *Appellants.*  
the CITY of DUBLIN - - - - - }

The Right Honourable FRANCIS BLACK-  
BURN, His Majesty's Attorney-Gener- }  
al, at the relation of JOHN M'MULLEN, }  
RICHARD PURDY, and HENRY STAINES, }  
on behalf of themselves and the other } *Respondents.*  
Householders and Owners of Houses }  
in the City of Dublin and Liberty and }  
Suburbs thereof, liable to Pipe-Water }  
Rents, and all liable to Metal-Main }  
Rents - - - - - }

Certain local Acts of Parliament gave the Corporation of the city of Dublin the power to take measures for supplying that city with water, and to levy rates and rents on the inhabitants to meet the expenses that might thereby be incurred. The corporation passed bye-laws appropriating part of the revenue thus raised in a manner not strictly falling within the provisions of these Acts. Some of the inhabitants of Dublin filed an information against the corporation for an account, and the Court of Chancery in Ireland decreed an account, and held the corporation answerable for all sums which it had received and appropriated in a way not strictly conformable with the provisions of the local Acts. The House on appeal affirmed this decree.

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**BETWEEN** the years 1775 and 1805 the Corporation of Dublin obtained from the Irish Parliament and the Legislature of the United Kingdom several Acts, for the purpose of providing a better supply of water

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for the city of Dublin. These Acts were commonly known by the name of the "Pipe-Water Acts." By these Acts the corporation was entrusted with the duty of laying down wooden pipes throughout the city for the supply of water, and empowered to compel the inhabitants to receive the water so furnished, and to pay certain rates for the same, which rates were to be applied according to the provisions contained in the Pipe-Water Acts, for the indemnification of the corporation and the benefit of the inhabitants. In the year 1809, it having been thought expedient to substitute cast-iron pipes for wooden ones, the corporation again applied to Parliament, and procured the 49 Geo. 3, c. 80, to be passed, which is generally known by the name of the "Metal-Main Act." This Act enabled the corporation to borrow money for the purposes of the work, to receive rates, to apply them in defraying expenses and in diminution of the debt, and to appropriate any surplus to the formation of a sinking fund, with a view to this last named object.

The corporation proceeded for a considerable number of years to exercise the powers granted by the Pipe-Water and Metal-Main Acts, without meeting with any serious interruption. At length, however, the inhabitants, thinking that the corporation had been guilty of some breaches of trust, an information was, on the 30th day of October 1823, filed in the High Court of Chancery, in Ireland, by His Majesty's Attorney-general for Ireland, at the relation of John M'Mullen, Richard Purdy, Isaac Stewart and Henry Staines, on behalf of themselves and the other inhabitants of Dublin liable to the water rates, setting forth the particular acts of the corporation by which they conceived themselves aggrieved, and particularly charging that a sum of 2,500 *l.*, of the pipe-water

revenue, had for many years been misappropriated by the corporation, by voting sums thereout to the members of the corporation, and by increasing the salaries of their officers and charging the same on that revenue.

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The information prayed that the corporation might be declared trustee of the rates and rents mentioned in said Act of the 49th of his late Majesty King George the Third, for the uses and purposes therein declared, and that the trusts thereof might be carried into execution, and also that an account might be taken of the monies received by the corporation, from the passing of the said last-mentioned Act, in respect of the rates or rents granted in and by that Act, and of the application thereof in each of the years in the said information mentioned, and of the expenses incurred in each year by laying down cast-iron or metal main and service pipes, or otherwise making additional alterations and improvements in the works, and also an account of the sums yearly applied in and towards the sinking fund from the time of the passing of the Act, and of the debts yearly paid off, and that an account might be taken of the money borrowed by the said corporation under the provisions of the Act, and due on the credit of the rates thereby granted, and of the money applied in payment of the interest of a debt of 67,800*l.* and of the money borrowed, and that the balance of the rates, after deducting the expense of laying down cast-iron or metal main and service pipes, or otherwise making any additional alterations and improvements in said works, might be ascertained and applied as directed by the provisions of said Act exclusively. And if it should appear that the money produced by the rates or rents so borrowed on the credit thereof had been applied to purposes not war-



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ranted by the Act, then and in such case the corporation might be decreed to replace such money to the account of the rates or rents, and that some proper person might be appointed to receive the rates or rents granted by the Act, or that the person or persons who then received same might pay the same into Court, to the credit of the cause, and for relief generally.

The Corporation of Dublin filed an answer to the information, in which it was alleged that the corporation had set forth how and in what manner, and when the rates had been received and disposed of; and it was denied that the corporation had misapplied the rates and the pipe-water rents.

And the corporation insisted that, from the fluctuating and variable nature and amount of the rents, it could not with any degree of certainty be stated at what period the debt and interest thereon, or the debt only, would or ought to be paid off, but that according to the best calculation on the subject, it appeared that in the latter end of the year 1826, there would be paid off, in principal and interest, the sum of about 100,000*l.*, and that there would remain to be paid in that year the sum of 99,600 *l.* It was admitted that the metal-mains would be subject to less decay than wooden ones, and the repairs thereof less expensive; and in support of the right to make the annual payments of 2,500*l.* out of the pipe-water revenue, the defendants referred to certain resolutions passed in the Assembly of the corporation in the years 1779 and 1809, authorising those payments. In July 1824, Lord Manners, then Lord High Chancellor of Ireland, before whom the case was heard, directed that the information should stand dismissed, with costs.

The relators appealed against this decree, and on

the 11th of May 1827, this House ordered that the decree should be reversed, and that the mayor, sheriffs, &c. of Dublin, should account for and apply the rates and rents in the manner mentioned in the Act, and that it should be referred to one of the Masters of the Court of Chancery in Ireland to take an account of all sums of money received by the corporation under the Act, and of the application of the same, and to state the balance of such account appearing at the end of each year respectively; and also an account of all sums of money borrowed at interest upon the credit of the rates and rents granted by that Act, and by the Acts therein recited, and which were necessary for the purpose of making such reservoirs, and laying such cast-iron or metal main and service pipes; and also an account of the several mortgages of the rents, or any part thereof for such purposes, and the costs of such mortgages, and to whom they had been made, and for what sum or sums respectively; and whether such sums so borrowed, exceeded or fell short of the sums authorised by the Act to be borrowed in the several years therein mentioned respectively.

And it was further ordered, that the Master should inquire and report the nature and particulars of the debt of 87,800 *l.* in the Act mentioned, and whether a fund had been duly provided, according to the directions of the Act, for redeeming and discharging the same, and all such further sum and sums of money as had been borrowed for the purposes, and within the several periods, authorised by the Act; and whether the mayor, sheriffs, &c. of Dublin had annually retained, out of the rate or rents granted by the Act, the sum of 2,000 *l.*, together with such sums of money as had been borrowed under the provisions of the

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Act; and whether all such sums of money by the Act directed to be retained, had been appropriated and applied, as a sinking-fund, to pay off and discharge the said sum of 67,800 *l.*, and such other sums of money as had been borrowed under the provisions of the Act; and generally, whether the interest on the debts had been duly paid, and whether the money received had been applied as directed by the Act.

And it was further ordered, that the Master should inquire and report whether the mayor, sheriffs, &c. of Dublin for the time being had kept accounts, as directed by the Act, of the receipts and produce, and amount of the rates and rents, and had paid and applied such part or balance thereof as from time to time remained, after retention of the several sums of money directed to be otherwise applied, as in the Act mentioned, in payment of the interest due on the money mentioned in the said Act to be then borrowed, and in laying down cast-iron or metal main and service pipes, or otherwise making such additional alterations and improvements in the works, and in increasing the sinking-fund created by the Act; and whether any deduction had been made from the rates and rents save for collecting the same; and, if any, what deductions, and on what ground; and whether any surplus had been at any time, and when, received by the mayor, &c., and whether such excess had exceeded the sum of 500 *l.*; and whether it had been from time to time added to the sinking-fund created by the Act, and paid and applied in like manner as the said annual sum of 2,000 *l.* was directed to be applied; and whether the whole of the sums of money due under the authority of the said Act had

been fully paid off and discharged, or whether any and what parts then remained due, and why the same had not been discharged. And the Master was to take an account of costs due, and of works unfinished, and the Court was to do such things as were necessary to carry the judgment of the House into execution.

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On the 19th May 1827 the Court, in obedience to this order, pronounced a decree by which it was adjudged that, by the terms of the 49th Geo. 3, the defendants, the mayor, sheriffs, &c. of Dublin, were bound to account for and apply the several rates and rents in the Act mentioned, in the manner expressed in the Act, so far as related to such rates and rents respectively. And it was referred to William Henn, esq., one of the Masters of the Court of Chancery in Ireland, to take the several and respective accounts before-mentioned, and the Master was armed with full powers to carry the decree into effect.

The Master made his report on the 18th September 1830. The Appellants took several exceptions to this report, the statement of which will fully explain the nature of the report itself. The first exception was, that the Master had improperly refused to allow an annual deduction of 1,500 £., claimed by the corporation as an annual rent or allowance which had by long usage been appropriated by the corporation out of the pipe-water rent, as rent in respect of the estate of the corporation in the watercourse from the river Dodder to the city of Dublin, and of the works thereof and about the same, and in part compensation for the several sums of money expended by the corporation upon the pipe-waterworks, though it appeared that, by an Act of Assembly made by the corporation on the 11th January 1779, "it was re-

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solved, that for the future no part of the pipe-water revenue should be appropriated to any use save the several uses of carrying on the works, paying the officers, &c., until the corporation should have discharged the several sums borrowed on the credit thereof, except the sum of 1,500 *l.* annually to be paid to the city treasurer for the use of the city, in compensation for the several sums expended previously to the late Act (meaning the 15th & 16th Geo. 3, c. 24,) upon the several works."

The second exception was, that the Master had not allowed a sum of 312 *l.* for interest on debentures, amounting to 5,200 *l.*, issued by the corporation before the passing of the 49 Geo. 3, though such debentures were still remaining due, and though interest to the amount of 6 per cent. per annum had been paid thereon by the corporation.

The third exception was, that the Master had not allowed a sum of 1,000 *l.* a year, as and for a salary to the lord mayor and treasurer to the corporation, though evidence was laid before the said Master, that by an Act of Assembly, passed in February 1809, it was, on the recommendation of a committee appointed for inquiring into the revenue of the corporation, and how the same might be increased and its expenses lessened, resolved, "That it would be much to the advantage of the said corporation to pay to the lord mayor and city treasurer the sum of 1,000 *l.* annually, in lieu of poundage or agency, such sum appearing to be less than the sums payable to them for poundage on an average of the preceding four years;" and that in every year since the passing of the said resolution, the sum of 1,000 *l.* per annum had been uniformly paid by the treasurer of the said corporation to the lord mayor and treasurer, out of the

pipe-water rents, and that the same had been allowed by the corporation to the treasurer in passing his accounts.

The fourth exception stated, that if the Master had made these allowances, there would not have been found an excess of more than 500 *l.* in the hands of the corporation.

The fifth exception alleged, that if the accounts had been properly taken, the Master could not have found, as he had found, that the debt of 100,000 *l.* might have been paid off in May 1825.

In reply to these exceptions, it was contended, that the corporation had, on making the resolutions now stated, exceeded the power given it by the Water and Metal Main Acts. These exceptions were fully heard before Sir W. M'Mahon, Master of the Rolls, and were over-ruled, and on the 7th July 1831, his Honor made a decree to the following effect :—

“ That the said report of the said Master do stand confirmed. And it appearing as to the execution of the works provided for under the statute, 49 Geo. 3, that the defendants (the Corporation of Dublin), in 1823 and 1827, had laid down metal pipes for the whole estimated length of 56 miles, and that since that period they had laid down an addition of 7 miles and 35 perches of metal pipes ; and it appearing that the defendants had not kept distinct accounts of the pipe-water and metal-main tax, as directed by the said Act, until the 29th day of September 1814 ; and it further appearing that the sum of 67,800 *l.*, mentioned in the 13th section of the said statute, and theretofore charged by the Acts therein referred to, upon the pipe-water tax and water works in the pleadings mentioned, and the sum of 32,200 *l.* borrowed under the provisions of the statute (and making to-

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gether 100,000 *l.*) had not been paid off by the said defendants, by the application of the funds provided for that purpose by the statute, and directed thereby to be so applied, and that the sinking fund created and appropriated by the Act had not been applied by the defendants pursuant to the provisions of the Act, and the trusts vested thereunder in the defendants, and that only the sum of 25,500 *l.* had been redeemed, and that a balance of 74,500 *l.* of said 100,000 *l.* remained outstanding and unpaid; and it appearing that the sum of 100,000 *l.*, if the provisions of said statute in that behalf had been executed by the defendants, and the funds duly applied pursuant thereto by them, would have been paid off on the 20th day of May 1825, leaving a balance in the hands of the treasurer of the said defendants, of 1,536 *l.* 3*s.* 6½*d.*; and it appearing that the metal-main tax was continued for two years after the 20th of May 1825, when it ought to have ceased, and that upon account of actual receipts and payments of the metal-main tax taken separately for these two years ending 20th May 1827, a balance of 7,001 *l.* 19*s.* 2*d.* would appear in favour of the defendants; and in taking the account for the two years of both the metal-main and pipe-water tax, and including therein the balance of 1,536 *l.* 3*s.* 6½*d.*, and excluding therefrom the said interest of 74,500 *l.*, a balance of 14,986 *l.* 9*s.* 5½*d.* would appear against the said defendants: It is declared by the Right Hon. the Master of the Rolls, that the said metal-main tax ought to have ceased on the 20th day of May 1825, and ought not now to be resumed or continued; and, that the relators or other owners and occupiers of dwelling-houses within the city of Dublin and suburbs thereof, and such parts of the liberties of St. Sepulchre as are subject to pipe-

water rents, ought to be exempt from the further payment of any metal-main tax, under the provisions of the statute 49th Geo. 3, and ought to be exonerated by the said defendants from any further or future liability to pay any tax or sum of money imposed or enacted under the said last-mentioned statute. And accordingly it is further ordered, adjudged, and decreed, that the relators and owners and occupiers of the dwelling-houses situate as aforesaid, ought to be exempt from such liability, and ought to be exonerated by the defendants from such liability. And accordingly it is further ordered, adjudged, and decreed, that the said defendants should, within six months from the date of this decree, pay off and discharge the said sum of 74,500*l.* to the different persons who are holders of the securities or debentures for the sum of 74,500*l.*, and thereupon to procure the said holders to acquit and discharge the said securities and debentures. And it is further ordered, that an injunction should issue to restrain the said defendants, the said corporation of the city of Dublin, from further collecting or levying the metal-main tax from the owners and occupiers of dwelling-houses situate within the city of Dublin, and the liberties or suburbs thereof, and such parts of the liberty of St. Sepulchre as were subject to the payment of pipe-water rents, or 'from any of them, until further order.'" And it was further ordered that the defendants should pay to the relators the costs of the suit, except so far as related to a charge made by the relators, that in laying down the pipes the corporation had not acted with a proper regard to economy, but had been unnecessarily extravagant, a charge which the decree stated not to have been proved. The costs occasioned by this charge were ordered to be paid by the relators to

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the defendants, and the Master was ordered to tax the costs accordingly. The master taxed the costs due to the relators in the suit at 5,329*l.* 12*s.*, and the costs due by them to the defendants at 22*l.* 12*s.*, leaving a balance of 5,307*l.* payable to the relators. The Master was subsequently ordered to review his taxation as to one part, and reduced it to 5,153*l.* as due to the relators, and this sum was ordered to be paid out of the balance in the hands of the corporation. The defendants then brought the present appeal against the decree of 7 July 1831.

Mr. *Pemberton* and Mr. *Tinney*, in support of the appeal, contended that the corporation had a right to appropriate the sums mentioned in the resolutions of January 1779, and February 1809, such appropriation being in furtherance of the objects of the Acts of the Legislature. The corporation had advanced money and prosecuted the works with great zeal and success, and if the letter of the different Acts had been strictly complied with there would have been a great delay in supplying the city of Dublin with water; that the corporation, in departing from the Acts in one respect, had thus conferred a benefit on the city, and ought, therefore, to be permitted, as was proposed in these resolutions, to reimburse itself the money thus laid out.

Sir *W. Horne*, and Mr. *Sugden*, for the Respondents, insisted that the corporation derived all its authority under these Acts, and had no right whatever to depart from the provisions which they contained. The corporation had made no sacrifice in carrying into effect the object of these Acts, and ought not therefore to claim any advantage beyond what the

Acts had provided; and at all events there was no pretence for saying that the lord mayor was entitled to receive such a sum of money as had been assigned to him as a salary by the two resolutions of the Assembly in 1799 and 1809.

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Lord *Brougham*:—This case was argued at great length in the course of last session, and the final determination of it was put off in consequence of some doubts entertained respecting it by Lord Wynford. In these doubts I did not concur, but if his Lordship had still continued to entertain them, the case must again have been argued by one counsel on each side. This further consideration of the case need not now be entered upon, and as a great public inconvenience would result from further delaying the delivery of the judgment, that delay ought no longer to be continued. I did intend to communicate with Lord Wynford on the subject, as, from the indisposition under which he is suffering, he is not likely for some time to be present in the House, and to ascertain how far he still entertained his former doubts, or whether they were removed. I have great satisfaction in finding that he, previous to any communication received from me, had reconsidered the case, and that the doubts which formerly possessed his mind are now entirely removed. He has authorised me to state his full concurrence in opinion with me on this case, my own opinion having been very clearly in favour of the judgment of the Master of the Rolls. The communication from his lordship states that “I now think that the judgment of the Master of the Rolls in Ireland is in every point right, and that the appeal should be dismissed with costs; I can find no legal origin for the right to pay over the sum of 1,500 *l.* to the corporation. I also

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think that the defendants were not warranted in paying a fixed sum of 500*l.* to the treasurer, instead of a proper per-centage on the sums received by him, and that they had no colour of a pretence for permitting their lord mayor to take, 1,500*l.* a year or any other sum out of the water tax on the citizens of Dublin. Striking these items out of the account, the debts provided for by the different Acts would have been paid off at the time mentioned by the Master of the Rolls. But if the 1,500 *l.* a year and the other items had a legal origin, the Acts contain no provision for their payment out of the pipe-water or the metallic-main rates; on the contrary, a different appropriation of the money raised by them is expressly directed. The first account that we have of any right of the corporation of the city of Dublin to the water for the supply of the inhabitants is in the 6 Geo. 1,"—a statute that was passed at a time which we all know was a period of very great speculation.—"It appears that the corporation had only then a stream of water running through the city, and from which the inhabitants were permitted to supply themselves by pipes introduced into it at their own expense, or by any other means. This stream is described as having anciently belonged to the corporation, which is required by the statute to incur certain expenses for securing the supply and preserving the purity of the water. I think that, although this stream is stated to be vested in the members of the corporation for the time being, they only held it in trust for the benefit of the town. They have been frequently made trustees of property for the use of those who lived within the limits of their franchise. The application of corporation funds for the preservation and improvement of this property was as proper

as any use that could have been made of them. If such an application had been more frequently made, we should have had fewer complaints of these bodies. Although this is stated to have been an ancient right of the corporation, nothing appears to have been ever paid by the inhabitants of Dublin to the corporation for the benefit which they derived from it. The first mention made of this appropriation of the rent is in a bye-law passed by the corporation on the 22d January 1779, in which it is said that "no part of the pipe-water revenue shall be appropriated to any use save that of carrying on the works, paying the officers, &c., until the corporation shall have discharged the several sums borrowed on the credit thereof, except the sum of 1,500*l.*, annually paid to the city treasurer for the use of the city, in compensation of the several sums expended by the city on the works." It appears from this that it was never paid antecedently to that period, and this is therefore the making of a new charge, for the benefit of those who created it. That may be; but such a bye-law is, on every principle that is applicable to bye-laws, bad. It must be recollected, also, that it was made after the 15 & 16 Geo. 3 had directed a different appropriation of these funds. Let us now look at this statute of the 15 & 16 Geo. 3, c. 24 (Irish Act), which is the most favourable for the corporation, authorising the raising of the pipe-water rents, for the construction of new mains and otherwise extending the waterworks, and by the 11th section we shall find that the corporation is empowered to borrow, on the credit of the said rates and rents, such sums as shall be found necessary for the purposes of the Act. What right has the corporation to prejudice the creditors by a postponement of the payment of their advances by taking to itself any part of the

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sums specifically appropriated to their payment and the completion of the waterworks. It is expressly found, that had not the waterwork rates been applied in satisfaction of the city claims and to other purposes not sanctioned by the Act, the debts would long since have been paid off. But the 49 Geo. 3. makes this question perfectly clear. By the 11th section of that Act the corporation is empowered to borrow on interest, on the credit of the rates and rents granted by the said recited Acts and by that Act, money for the making of reservoirs and the laying of cast iron or metal main and service pipes. Among the recited Acts is that of the 15 & 16 Geo. 3, and, by the 13th section of the 49 Geo. 3, all the money raised under all these recited Acts is to be appropriated to the payment of the debt of 67,800*l.*, and to the payment of 2,000*l.* annually towards the interest of that debt, and of such sums as may be afterwards borrowed for the purpose of completing the works, and for the establishment of a sinking-fund for the reduction of these debts. By the 16th section it is enacted, that if there be any surplus, either of the money raised under that Act or of the recited Acts, the surplus shall be added to the sinking-fund above provided. If the Lord Mayor of Dublin and the corporation had any claim for the 1,500*l.*, or the 1,000*l.* for the Lord Mayor, or the 1,000*l.* for the treasurer, or the interest of the money raised by the debentures, they should have asserted it at the time of the passing of that Act, which now precludes them from claiming credit in these accounts against the rates in any court of justice. I entirely go along with the noble and learned Lord in the view he now takes of this matter, though I do not entirely concur in every part of the observations

here made by him. I am very happy to say in this decisive manner, that he no longer entertains the doubts which formerly made him hesitate about the judgment. As we are now both of the same opinion, I shall move that the decree of the Master of the Rolls be affirmed; and, considering who the parties are, that it be affirmed with costs, the amount of which shall be ascertained in the way in which costs are usually ascertained in this House.

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Lord *Plunkett*:—I took no part in this case when it was argued at your Lordship's bar, having been counsel in the case in the Court below. For the same reason, when it came into the Court of Chancery in Ireland, since I presided there, it was at my request that the argument was heard before the Master of the Rolls. He decided it, as I think, rightly; and I therefore concur in the judgment now recommended to your Lordships.

Judgment affirmed accordingly.

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## APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

THE CORPORATION OF DUBLIN

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THE ATTORNEY GENERAL.

*Costs of Ap-  
peal.  
Jurisdiction.  
Indemnity.*

Upon an order (a) remitting the cause to the Court below to take the accounts, &c., but containing no direction in respect to the cost of the appeal, the Court below, exercising its inherent jurisdiction, and holding that the relators should be fully indemnified, ordered payment of their costs of that appeal out of the ascertained balance, which, upon taking the accounts, appeared due from the corporation, though not paid into Court.

This order was affirmed with costs.

THE costs mentioned in p. 300, *ante*, as taxed by the Master and ordered to be paid to the relators, included their costs of prosecuting their former appeal to this House. The order of their Lordships on that appeal gave no directions as to the costs of it, nor were those costs brought under the consideration of the Master of the Rolls, when he made the decree of the 7th of July 1831. Master Henn, to whom it was referred by that decree, to tax the relators' *costs of the suit*, taxed the same accordingly, to the sum of 3,719*l.* 6*s.* 7½*d.*, but declined to tax so much of the bill of costs as related to the appeal, which amounted to 1,610*l.* 6*s.*, alleging that he conceived he had no jurisdiction to tax them, and that such was the opinion of Mr. Courtenay, then deputy-clerk of Par-

(a) See *ante*, p. 293.

liament, but he allowed them as they were furnished to him by the solicitors for the relators, and adding them to the taxed costs of the suit, he certified that, after certain deductions directed by the decree, there remained the sum of 5,306*l.* 19*s.* 9*d.* payable by the corporation to the relators for the costs of the suit as between solicitor and client.

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The corporation presented a petition to the Court, praying among other things, that the Master might be ordered to review the said taxation and certificate in respect of the costs of the appeal. That petition came on to be heard before the Master of the Rolls, and his Honor, on the 25th of January 1832, after stating the object of the suit and what was alleged in the information and answer, made the following observations in his judgment :

“ In 1824 the cause came on to be heard, and the information was dismissed ; but on an appeal from the decree of dismissal, the House of Lords gave relief, and the winding up has given this result :—that up to 1827, a very large balance is found to be in the hands of the corporation ; but taking it up to May 1825, the Master’s report shows the whole debt of 100,000*l.* would have been paid off, and a sum of 1,563*l.* 3*s.* 6½*d.* remaining in the hands of the corporation ; but the Master taking the account down to May 1827, finds that so large a sum as 14,986*l.* 5*s.* 2*d.* is in their hands in May 1827. On that state of facts, the decree in this cause was pronounced, reciting that sum to be in their hands, and decreeing the costs of the suit as between solicitor and client to the relators. The question now is, whether I can give the costs of the appeal out of that fund. The power is not delegated by the decree of the House of Lords. I have given this case the most attentive consideration. My



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power can only be an inherent jurisdiction; and I have no doubt the Court possesses inherent jurisdiction, and that I am bound to exercise that jurisdiction. Here a fund exists of 14,986 *l.* 5 *s.* 2 *d.*, out of which the relators ought, in my judgment, to be indemnified. It is an ascertained sum, being the receipt of the tax from 1825 to 1827, which sum I would order into Court, if there was any use to apply it to. The case of *Noel v. Henley* (b), stands on the ground that the Exchequer held the costs came remitted to them; this, I say, does not exist in the present case. This case is not to be decided on a principle of appeal costs, but as indemnity costs to relators, whose individual interest is small. The question is, if relators instituting a proceeding, as in the present case, in which their interest is very small, and succeeding in *omnibus*, are not entitled to indemnity in every fair expense; I think they are. If it were otherwise, there would be found no person who would allow his name to be used to right a public wrong, and the consequence would be destructive; and I do not think any thing technical should prevail against their being indemnified. In the present case the relators not only recover for the citizens a sum of 74,500 *l.*, but by their proceedings the citizens are relieved from an onerous taxation of 10,000 *l.* per annum. Such relators ought to be indemnified out of the fund as I have before stated. *The Attorney-General v. The Brewers' Company* (c), *Moggridge v. Thackwell* (d). In the latter case, on a hearing, the costs of all parties were decreed to be paid out of the fund. The case of *Mills v. Farmer* (e), decides the principle of this motion. In that case the Master of the Rolls dismissed the information: his

(b) 2 Fricc, 700.

(c) 1 P. Wms. 376.

(d) 7 Ves. 36; see p. 87.

(e) 1 Meriv. 55; see p. 104.

order was reversed on appeal, and the costs of the appeal given out of the fund. That case decided, that the costs of an appeal ought not to be visited on the parties, but if there was a fund, they should be given on the principle of indemnity. The principle, as I conceive, on which the costs of appeal to the House of Lords should be taken out of the general fund is, there being a fund whereout the costs may be paid. For these reasons, under all the circumstances presenting themselves to me in this cause, my Order is—that the Master's certificate was right in including the costs and expenses of the relators in prosecuting the appeal, subject to the review thereof hereinafter ordered; and accordingly it ordered, that the Master in this cause, do review the items in the sum of 1,610 *l.* 6 *s.*, certified in his certificate, as the costs of the relators in the said appeal; and in reviewing the same, the Master is to allow only such costs, disbursements and expenses, as were properly and necessarily incurred by the relators in prosecuting the appeal."

The Master, in pursuance of that order, reviewed the items of the said sum of 1,610 *l.* 6 *s.*, and reduced the same to 1,474 *s.* 2 *s.* 4 *d.*, which he certified to be the amount of the costs, expenses and disbursements incurred by the relators in prosecuting the said appeal, properly chargeable against the corporation.

The Appellants complained also of this order, and the arguments on that part of the appeal were to the following effect:—

The Counsel for the Appellants insisted that the Court of Chancery in Ireland had no jurisdiction to order the Appellants to pay the Respondents' costs of the former appeal to this House. The order of the House upon that appeal gave no direction about the costs, nor was the consideration of them remitted to

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the Court below. The concluding part of the order of the House on that appeal was, "and that the said Court do all such things as shall be necessary to carry this order and judgment into execution, reserving to the said Court the consideration of further directions and the *costs of the suit*, until after the Master shall have made his report." The costs of the suit could not be intended to include the costs of the appeal. The Master of the Rolls admitted that the order of the House did not delegate to him to give the costs of the appeal. The question, therefore, was, whether the Court below had an inherent jurisdiction over these costs. The cases referred to by the Master of the Rolls did not sustain the jurisdiction. In the case of *Noel v. Lord Henley* (f) the Barons of the Exchequer held properly that the costs of the appeal in that case were left to their discretion by the terms of the order of the House, which, after varying their former decree, concluded thus: "And with these variations in the said decree, it is ordered that the cause be referred back to the Court of Exchequer to *do therein as shall be just*." *Noel v. Noel* (g). The principle on which costs were given in the other cases referred to by his Honor was, that there was a fund in Court, out of which the costs of all parties ought to be paid in a suit for the administration of a charity. In the present case there was no such fund in Court, but the corporation was called on to pay the costs from its own funds. Master Henn declined to tax these costs; his experience informed him that he had no jurisdiction over them, and the clerk of this House, on being consulted, replied that

(f) 12 Price, 700.

(g) 12 Price, 213. See 334, and 55 vol. Lords' Journals, 773.

these costs were not taxable by any legally-authorized officer.

The Counsel for the Respondents admitted that the House did not, in adjudicating on the former appeal, give any directions about the costs of it. The order then made was a mere proceeding in the cause, remitting it to the Court below to take the accounts; and no direction could be given in respect to costs in that stage; until the accounts were taken, it could not be known whether there should be a fund to answer the costs. For the same reason no order was made about the costs on the first hearing in the Court below, but when the cause came to be heard on further directions, the decree then made contained the usual order of reference to the Master to tax the costs.—[Lord *Brougham*, Chancellor: Can any case be cited where the Master of the Court of King's Bench or a Master in Chancery has taken upon himself to tax costs incurred in this House?—Such cases had occurred, and were referred to by the Master of the Rolls. If the costs asked by the Respondents were personal costs against the Defendants, the Court below could not give them, as the House gave no directions about them. But these costs were not asked personally as against the Appellants, but out of a common fund. This was a case of a charity and trust, in which cases it was the invariable practice, when there was a fund in Court or a fund with which the Court could deal, and the Court found merit in the relators, to give them not only their direct costs in the suit, but also all costs incurred in prosecuting it, out of that fund. It was true that in this case there was not a fund actually in Court, because, out of lenity to the corporation, the relators did not ask for payment of the balance of

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14,986*l.* 5*s.* 2*d.* into Court. But this lenity on the part of the relators could make no difference in their rights, nor in the jurisdiction of the Court.

In appeals from the Master of the Rolls or Vice-Chancellor to the Lord Chancellor, if a decree below should be reversed, the superior Court would not, in ordinary cases, give costs of the appeal against the failing parties, because that would be to punish them for the error of the Judge below. But in case of a charity, when there was a fund in Court, or an available fund, the costs may be ordered out of that fund. This House, sitting on appeal from a court of equity, is itself a court of equity, and has the like power.

There were several cases on this subject besides those referred to by the Master of the Rolls in Ireland. On one of the appeals in the *Thelluson* Will case, in 1825, the Court below gave costs of the appeal, without any direction from the House. So, also, in the cases of *Atkins v. Wright (h)*, there were two appeals in the same session. The orders of this House reversing the decrees of the Master of the Rolls and of the Lord Chancellor, made no mention of the costs; yet Lord Eldon, upon the cause coming before him in the Court of Chancery afterwards, gave the Appellant, after a very strong opposition, the costs of both appeals, amounting to 3,000*l.* These cases were stronger than *Noel v. Henley*, and the Court below, in ordering costs of the appeal, did not interfere with the order of this House, but supplied a defect in it. There remained a sum of 14,986*l.* in the hands of the corporation, which con-

(h) See 17 Ves. 255; 19 Ves. 299; 1 Ves. & B. 313; 55 *Lords' Journ.* pp. 598 and 844; and *Turner & Russ.* 143.

stituted a fund out of which the costs of both parties might be paid.

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Lord *Brougham*, Chancellor, in moving the House to affirm the decree of the 7th of July 1831, omitted to notice this part of the appeal against the order of the 25th of January 1832; but the order of the House, as entered on the Minutes, affirmed the order as to costs as well as the decree.

It is *ordered* and *adjudged* by the Lords, &c., that 1 April 1835.  
the said petition and appeal be and is hereby dismissed this House; and that the said decree (of the 7th July 1831) and order (of the 25th January 1832) therein complained of, be and the same are hereby affirmed, &c., with costs.—67 *Lords' Journals*, 77.

## WRIT OF ERROR

1835.

May 21.

FROM THE EXCHEQUER CHAMBER.

JAMES ANDREWS - - - - *Plaintiff in Error.*

THOMAS DREVER,	THOMAS	}	<i>Defendants in Error.</i>
MAWDESLEY and	WILLIAM		
TURNER - - - -	- - - -		

*Tithes.  
Evidence.*

The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropiator.

From evidence of right to tithes of all kinds in a lay impropiator up to a given time, and of perception of the corn tithe since that time by another party, a jury may, if it think fit, infer a grant of all the tithes by the first-mentioned impropiator to such latter party, who is therefore at liberty, in support of his right to the hay tithe, to give in evidence leases of that and all other tithes from the presumed grantor.

THIS was an action of debt, brought in the Court of King's Bench in Easter Term 1831, by the Defendants in Error, against the Plaintiff in Error, upon the stat. 2 & 3 Edward 6, c. 13, for not setting out tithes. (a) The declaration stated that the Plaintiffs below were proprietors of the tithes of corn, grain and hay, of certain lands in the parish of Prestbury, in the county of Chester, and that the Defendant below was occupier of the same lands. It then set forth the subtraction of the tithes by the Defendant, and claimed the treble value. There was a plea of *nil debet*, and a particular of demand, from which it appeared that the action was brought to recover the value, single or

(a) See the case argued in Error before the Exchequer Chamber, *nom. Bayley v. Drever*, 1 Ad. & Ell. 449; 3 Nev. & Man. 885. See also *Andrewes v. Drever*, 2 Scott, 1; 2 Bing. N. C. 1.

treble, of the tithe of about 20 acres of hay, for six years, commencing with 1825. The cause was tried at the summer assizes of 1831, for the county of Chester, before Mr. Baron Bolland, when the plaintiffs obtained a verdict for 105*l.* 15 *s.*, being treble the amount specified in the particular of demand, for which sum judgment was entered up accordingly.

At the trial, the counsel for the Defendant below tendered to the ruling of the learned judge a bill of exceptions, which set forth all the material facts, stating, in substance, that in support of the Plaintiff's case, the following evidence was given:—1st. Certain letters patent of Queen Elizabeth, dated 10th November 1579, granting to divers persons, one of whom was Thomas Leigh, among various other things, “the tithes, portions and oblations, issuing, &c., out of and in the vill, fields, parish or hamlets of Prestbury; and also all the rectory and church of Prestbury, (which said rectory and premises to the monastery of St. Werburg did theretofore belong,) and all manors, glebes, tithes, &c., situate, &c., in the vill, fields, parish or hamlets of Prestbury, or elsewhere, in the county of Chester, belonging to the said rectory.”—2dly. A deed of partition, dated 1586, whereby the other grantees conveyed to the said Thomas Leigh, the said manor and church of Prestbury, with all its appurtenances.—3dly. Certain leases of the tithes (comprehending, *nominatim*, every species of tithe and obvention,) arising within the township of Woodford, in the parish of Prestbury (within which township the lands of the Defendant, in respect of which the tithe was claimed, were situated), purporting to have been granted by different members of the family of Leigh, for terms of years long before expired, upon certain of which leases the receipt of rent was duly proved.

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4thly. Similar leases of the tithes arising in other townships of the same parish, purporting to have been granted in like manner by the family of Leigh; as to some of which also payment of the rent reserved thereon was duly proved.

The bill of exceptions further stated, that on the part of the Plaintiffs, Thomas Broadbelt deposed, among other matters, that in 1811 he became valuer of the tithes of the parish of Prestbury, for Mr. Richard Leigh, of Adlington, who died in 1822; that witness received tithe rent from the occupiers of the different farms; that he valued the tithes of Woodford, and, among others, those of the Defendant's lands, viz., corn, grain, barley, cattle, pasture, and meadow; that he never received any tithe in kind; that from one Martha Barber, an occupier of land in the township of Butley, in the parish of Prestbury, he once received 5*s.* for a tithe of hay; that was after the dispute about the hay tithe arose; he did not know of any other receipt of hay tithe; that the occupiers of land in the parish of Prestbury had, some all hay, and some both hay and corn; there were 300 farms in the parish; all these had hay grass, some had no corn; he valued the hay on each farm every year, and it was in the year 1815 or 1816 that the occupiers of the lands in Woodford first objected to pay for hay; that payment for hay was claimed, and it was always included in the valuation; since the dispute the rents had been estimated with reference to the corn tithe only; he could not say that he had ever received hay tithe; he never saw the tithe of hay set out.

Thomas Deane deposed, that he began to value the parish of Prestbury in the year 1818, and continued to do so till the year 1827; he valued both corn and

hay tithe; in the year 1825 the valuation of the hay tithe on the land of the defendant was 3*l.*; he received for corn tithe only.

Thomas Grimsditch deposed, that he had been acquainted with the Adlington estate upwards of thirty years; Mrs. Elizabeth Leigh was the first person he remembered in possession; she was succeeded by Richard Leigh; since Richard Leigh's death, in 1822, witness had been connected with the management of the property, and up to the appointment of a receiver, he received the rents for the tithes on account of the Plaintiffs; from the year 1825 he opened an account with the Macclesfield Bank, in the names of Turner and Mawdesley, two of the Respondents, and directed the payments to be made to that account; Dr. Drever, the other Respondent, was not then in the country; witness accounted to all three; witness had been a resident in the parish of Prestbury, and occupied lands in the township of Macclesfield in that parish; it was almost entirely meadow land; he had paid tithe of hay; that was after the commencement of the suit for the hay tithe. The first resistance to pay that tithe was in 1814; the claim preceded the objection, and was for a time acquiesced in. That the case for the Plaintiffs being concluded, it was objected on behalf of the Defendant that there was no evidence of any right or title in the Plaintiffs to the tithe of hay, and that the leases which had been given in evidence by the Plaintiffs were irrelevant to the issue, and ought to be withdrawn from the consideration of the jury, inasmuch as the Plaintiffs were not shown to derive any title from, or to be any way connected with the persons by whom the said leases were respectively granted. But the Court overruled both objections, and held that there was

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evidence of title in the Plaintiffs to the tithe of hay, and that the leases were not irrelevant, and refused to withdraw them from the consideration of the jury. On the part of the Defendant, witnesses were then called, who severally deposed, that they had been formerly occupiers of land within the parish of Prestbury, but not within the township of Woodford; that they never knew or heard of any claim or payment of the tithe of hay in respect of such lands, so long as they continued in the occupation thereof; that the payments of tithe were always made in money, but that the sums paid were not more than the amount of the corn tithe in each year.

The bill of exceptions then stated, that the learned judge directed the jury, that mere non-payment of tithe was no answer to a claim of the tithe by a lay impropriator; that it was clear it was no answer to the claim even of a lay rector, and that the jury could not presume a grant from mere non-payment of tithes; that from the evidence of the grant from the Crown in 1579, and the evidence of modern enjoyment of tithes, the jury might presume, in favour of the Plaintiffs, intermediate conveyances of the rectory between that time and the year 1686, the date of the first lease produced; that the perception of the tithe of corn by the Plaintiffs, was evidence of a title in the Plaintiffs to the tithe of hay; that the tithe of hay followed that of corn, unless shown to be severed by some grant or conveyance, and that the leases were admissible evidence for the purpose of rebutting the presumption of a grant, which, it was contended on the part of the Defendant, arose from the non-payment of the tithe of hay: to all which opinions and directions of the learned judge, the counsel for the Defendant excepted.

Upon these exceptions, a writ of error was sued out in the Court of Exchequer Chamber, where the judgment of the Court of King's Bench was affirmed. The case was argued before Lord C. J. Tindal, Lord Lyndhurst, C. B., Justices Park, Gaselee and Bosanquet, and Barons Bolland and Gurney (*a*).

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The Defendant below now brought his writ of error in Parliament for reversing both these judgments. In pursuance of an order for the attendance of the Judges, Lord Chief Justice Tindal, Justices Park, Gaselee, Littledale, Patteson, Williams and Coleridge, and Barons Parke, Bolland and Gurney, were present during the argument.

Sir *F. Pollock* and Mr. *J. Jervis* for the Plaintiff in Error:—In this case, a claim has been made to tithe of hay on lands from which such tithe has never been paid. Although the question in this case cannot arise again, in consequence of the recent Act (*b*) for shortening the time required in claims of exemption from tithes, which was passed subsequently to the institution of this suit, still, as there are many other suits pending between the respondents and landholders in the parish of Prestbury, each involving the same question, it has been deemed proper to take the decision of your Lordships in this case, which will govern all the others.

It is an established rule of law that when a party has been, for a long period, in possession, his enjoyment or exemption is presumed to be legal, derived from some grant, which has been lost or destroyed. That rule rests on the acknowledged principle that from long undisputed enjoyment a legal origin and title ought to be presumed. The only exception to the rule is the supposed exception presented by this

(*a*) See 1 Ad. & El. 449. and 3 Nev. & Man. 885.

(*b*) 2 & 3 Will. 4, c. 100.

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case. If a man enjoys a right of way over his neighbour's land for a period of only 20 years, his enjoyment is lawful, presumed to have been derived from a former grant: why should not an exemption from payment of tithes be admitted on the same principle? Although there are authorities which seem to bear out the proposition that no distinction exists in this respect between a lay and a spiritual rector, and that mere nonpayment of tithes, however remotely carried back, furnishes no answer to the claim of either, yet these authorities, when examined, will be found to rest on no sure foundation. They proceed on the assumption that the claim founded on nonpayment, as evidencing a lost grant, is in substance and effect a claim of prescriptive exemption from tithe altogether, which it is admitted cannot prevail against either a spiritual rector or a lay impropiator; but the two cases are essentially distinct, the one being a claim which is inconsistent with the nature and origin of the property, the other being in no respect inconsistent with either, and being at the same time in strict accordance with the rules of law as applied to every other description of property having similar qualities.

Before the dissolution of monasteries the property of the church could not be granted away from the church, and no layman could plead an entire exemption from the payment of tithes. There could therefore be no prescriptive title in a layman, whether arising from grant or from release. But when, after the dissolution, a portion of the church property came into the hands of laymen, the nature and character of that property were altered; it acquired the qualities of lay property generally, and became susceptible of every modification, of which lay property admitted.

There is nothing, therefore, unreasonable in the supposition, that the whole, or a portion of the tithes of a rectory, may have been granted away, either in perpetuity or for a term; or, what is substantially the same proposition, that an individual proprietor of lands subject to tithes, or the whole of such proprietors within a given district, should have purchased, for an adequate consideration, a release from the payment of the whole or some particular species of tithes. In the contrary doctrine, on the other hand, there is the anomaly, that time, which gives stability to all other property, impairs the security of this, by destroying the evidence of title on which it is founded, without affording any equivalent protection from the length of enjoyment.

The doctrine, of which the Plaintiff in Error complains, has been frequently questioned by very distinguished Judges, among others, by Lords Roslyn, Redesdale and Eldon, Barons Clarke and Wood, as at variance with the principles of law and of equity; and although the balance of reported decisions is against the Plaintiff, all the arguments and reasons are in his favour, the Judges lamenting that they were bound by the authorities, and looking to this House for a remedy. The cases are collected in Mr. Eagle's book upon tithes, vol. 1. c. 3, s. 6. p. 92. In the case, of *Williams v. Bacon* (b), on appeal from the Vice-Chancellor, Lord Eldon, (c), said, "This doctrine of presumption is of great importance in the law of the country, and ought to be settled. If you look at the cases in which the question has been discussed,—what is necessary to prove title to tithes? Some say, you must produce the grant; others that you must give evidence of the

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(b) 3 Eag. & Y. 1178.

(c) 1 Sim. & Stu. 415.

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existence of the grant ; others say, if there be nothing more than nonpayment to the rector, and if the title, deeds of the landowner contain tithes, but he has not received them, that will not do against the rector ; others say, you must prove that the deeds contain a fair description of what you call tithes, and that there has been enjoyment under the title ; some say, that will not do against spiritual rectors ; others say, that it will, and that a jury may, in such cases, be properly directed to presume, title," &c. " In all the cases there is to be found a great difference of opinion." Similar observations were made by his Lordship, in the case of *Norbury v. Meade* (d), and Lord Redesdale there questioned at great length the doctrine that a prescription in *non decimando* was as illegal against an impropiator as against a spiritual rector, " Admitting that it is not now necessary for an impropiate rector to deduce his title from one person to another, after a grant from the Crown has been shown, because the Courts are aware that deeds of that description may be lost ; and therefore, if the grant of the Crown and a recent title or possession according to that title are shown, then the Court will admit a presumption that the title has been properly deduced," still why there should be a presumption in favour of a lay rector, and not in favour of the occupier of the lands, he could not conceive. " In both cases the presumption must be founded on the probable loss of instruments, &c. The Court of Exchequer will presume a loss of deeds in favour of an impropiate rector, but not in favour of the owner of the land ; that seems so unlike equal justice, that I cannot conceive how it could ever have been adopted, &c. There is such a clear distinction between ecclesiastical and lay rectors, that the

(d) 3 Bligh, 226-230.

reasoning applicable to one is not applicable to the other. The ecclesiastical rector is incapable of alienating, the lay impropiator is capable of alienating. Since the dissolution of the monasteries, lay impropriations are as much lay fees as the lands out of which the tithes issue; and, therefore, I cannot conceive upon what ground there can be a distinction between the case of a person claiming a lay impropriation and the case of a person claiming lands, &c. The title is one and the same, &c. If a profit of any kind, that is to be taken out of the land, has not been taken for a vast number of years, and the lands have been enjoyed without yielding that profit to a third person, the consequence is, that the title to that profit shall be presumed to be discharged, whatever is the nature of that profit. What is the distinction between that case and the case of an impropriate rector claiming tithes? I perceive none (e).” *The Corporation of Bury v. Evans* (f), *Charlton v. Charlton* (g), and *Fanshaw v. More* (h), are cases deciding that a layman cannot prescribe, even against a lay impropiator, in *non decimando*, a doctrine which is not disputed; for the argument is, not that the lands were never subject to tithe of hay, but that they were discharged by grant or release. In the case of *Fanshaw v. More*, Baron Clarke observed, “Many persons purchased discharges from lay impropiators, yet if the grants are lost these persons must lose the benefit of their purchases. It will be very hard that time, which strengthens all other rights, should weaken this,” &c. “A layman may prescribe upon the presumption of a loss of a grant for a portion of tithes on the lands of another, even against the

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(e) 3 Bligh, 237-245.

(g) Bunb. 325.

(f) 2 Com. 643. Bunb. 345.

(h) 2 Eag. 92. 2 Gw. 781.



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rector of the parish, and yet cannot prescribe for the tithes of his own lands in the same way. If I, therefore, concur in this opinion, it is by mere force of authority, for the reason of the thing is strong against them." In *Fanshawe v. Rotheram* (i), the bill prayed an account of tithe of hay; the answer was, that the hay tithe was severed from the rectory and annexed to the owners of the land in fee, but no deed of severance was produced. Lord Keeper Henley dismissed the bill, saying it was not necessary to produce the deed of severance, but to give evidence that there was one, and declaring that it was against equity to dispute a possession of 130 years; so also in *Scott v. Airey* (j), the bill which prayed for an account of a portion of tithes was dismissed, on an exemption for 170 years, and the Court of Exchequer following that precedent in *Edwards v. Lord Vernon* (k), dismissed the bill on an exemption for 171 years. In the case before the House, the lands have descended from father to son for ages without payment of the tithe now demanded. The argument is not that the tithes have been extinguished, but that the right of pernaney is not in the lay rector, but in the owner of the land. Chief Baron Macdonald said, in *Lord Petre v. Blencoe* (l), "If non-payment for any length of time forms no presumption of a grant of tithes, length of enjoyment, which, in all other cases, is the best title, seems only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. But the cases prevent us from deciding upon the ground of presumption. These determinations are perhaps to be lamented." Lord Eldon, in *Berney v. Harvey* (m), stated that Lords

(i) 1 Eden, 276.

(k) 2 Eag. & Y. 344.

(j) 2 Eag. & Y. 342.

(l) 2 Eag. & Y. 467.

(m) 2 Eag. & You. 746.

Hardwicke and Talbot struggled hard against the doctrine. The case of *Nagle v. Edwards* (n), a leading case in support of the doctrine, was disapproved of by Lord Roslyn, in giving his judgment in *Rose v. Calland* (o). And Mr. Baron Wood, in *Norbury v. Meade* (p), disapproving of *Nagle v. Edwards*, and *The Corporation of Bury v. Evans*, asserted the broad principle that long usage and enjoyment were sufficient to raise a presumption of a grant.—[Lord Brougham:—Is there any case in which the mere nonpayment of tithes, by the terre-tenant, was held to be an answer to the claim? *Medley v. Talmy* (q), would seem, from the marginal note, to be such a case, but from the statement of the facts in the context it appears there was a conveyance of the land tithe-free.] —There is a case to that effect, *Oxenden v. Skinner* (r), which was the case referred to by Mr. Baron Wood. These are conflicting cases, and a fair opportunity is now presented to your Lordships to settle the law. With respect to the evidence of title given by the Plaintiffs below upon the trial, it is contended that they do not show in what character or by what right they claim the tithe; that the title to it is shown to be, up to the year 1832, in the family of Leigh of Adlington; that there is no proof that the Plaintiffs are in any way connected with, or derive any title from that family; that the mere perception of the corn tithe for a short period before the commencement of the action furnishes no ground for inferring a title to the hay tithe, inasmuch as it is competent to the owner of the rectory to make a lease of the corn tithe only, retaining the rest to himself; and

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(n) 2 Eag. & Y. 344.

(q) In 1696. 1 Eag. & Y. 620.

(o) 5 Ves. 186.

(r) 3 Eag. & Y. 1834.

(p) 2 Price, 347.

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that it is consistent, therefore, with the case proved by the Plaintiffs that they may be lessees of the corn tithe, without having any right to the tithe of hay.

If the presumption of a grant of nonpayment of tithes should be held admissible, the leases and counterparts given in evidence by the Plaintiffs cannot then be received to rebut that presumption, because it is quite consistent that there should be a grant or release of the tithe to an individual proprietor of land, or to the proprietors generally of the lands comprised within a particular district, and that the rest of the land in the same parish should still remain subject to the original burthen.

The *Attorney-General* and Mr. *Temple* for the Defendants in Error:—The judgment of the Court of King's Bench, affirmed in the Exchequer Chamber, was the result of the unanimous opinion of all the Judges; no one of the cases referred to, even *Medley v. Talmy*, or *Oxenden v. Skinner*, which were most relied on, was opposed to the ruling of the learned Judge who presided at the trial. The decisions were uniform, and the reluctant acquiescence of the Judges, whose opinions were cited, only showed that the current of authorities in support of the doctrine contended for by the Defendants in Error, was too strong to be resisted. Mr. Baron Wood's arguments, in *Norbury v. Meade (s)*, comprised all that could be urged against that doctrine, but he stood alone against the three other Barons of the Exchequer. Two recent cases, *Ross v. Aglionby (t)*, in the Court of Chancery, and *Fairfax v. Holdsworth (u)*, in the

(s) 2 Price, 547.

(t) 4 Russ. 489.

(u) 1 Younge, 79.

Exchequer, subsequently heard, upon appeal in this House (w), strongly confirmed the former decisions. But supposing mere nonpayment of tithes to be deemed sufficient to raise a presumption of a grant of such tithes against a lay impropriator, yet in the present case there was ample evidence produced to rebut such presumption, and to establish the right claimed. The documents and testimony, the admission of which was objected to on the part of the Plaintiff in Error, were properly admitted as legal evidence fit for the consideration of the jury, the same strictly bearing upon the issue in question between the parties, and being such as are universally received upon the trial of such issues; and those documents and testimony, with the other evidence produced upon the trial, were sufficient in point of law to maintain the right contended for, and to warrant the verdict as found by the jury.

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The Judges were requested to give their opinion on the following question, framed for them by Lord Lyndhurst,—Whether the mere nonpayment of tithes is a sufficient answer to a claim of tithes made by a lay impropriator?

Lord Chief Justice *Tindal*, after conferring for a short time with the other Judges, said:—I have to state to your Lordships the unanimous opinion of my learned brothers and myself, that the mere nonpayment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator. That there can be no prescription in *non decimando* against a lay impropriator is a principle of law so thoroughly settled that it can admit of no doubt. The only legal ground, therefore, on which the non-pernancy of tithes can

(w) *Ante*, p. 115.

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be set up as an answer to a claim of tithes, is, that it affords the presumption of a grant of tithes, made by the lay impropriator to the terre-tenant. So far as the authorities have been brought before your Lordships, not a single instance can be found in which there has been a presumption of a grant from the lay rector, where there has not been some positive evidence, something more than the mere non-perception of tithes from all time, as the foundation of such a presumption. The course of authorities is uniform in this respect, so as to render it unnecessary for us to enter into that discussion. But the question put by your Lordships is comprised in terms merely negative, that there has been no perception of tithes by the lay rector at any period; no positive or affirmative ground is suggested; no separation of any one species of tithes from the rest; no description, in any way, of the deed which forms the muniment of the title to the land by which the land itself is stated to be tithe free; no instance suggested in which the tithes have been treated as property by the owner of the land, either in family settlements or conveyances from one hand to another, or in leases from the owners of the tithes; in all which cases there would have been a positive dealing with the tithes as a substantive property, separate and distinct from the land; and in which the enjoyment of that property by the nonperception by the lay rector would have gone along, and have been consistent, with the documentary evidence. In these supposed cases nothing would have been wanting but the production of the original grant of the tithes from the lay rector to the terre-tenant; and the want of such original grant might well be supplied by the presumption that it once existed, and was lost by time or accident, on the ordinary grounds on which such presumptions are

made; but the presumption in this case, if made at all, must be grounded on the mere non-perception, and nothing else.

We are unable, however, to see how far the presumption, resting on such negative grounds alone, can be distinguished, either in principle or effect, from a prescription in *non decimando*. In both cases the evidence, and the only evidence, must be the right of the rector on the general law of the land, the occupation of titheable land by the terre-tenant, and the non-perception by the rector of tithes arising from the land in the earliest times; the claim on the part of the owner of the land is precisely the same, whether set up as a prescription in *non decimando* or the presumption of a grant; it is in both cases a claim that the land is to be held free from the payment of tithes; if, therefore, such a state of facts can be held to support the presumption contended for, it would necessarily follow that in every case the nonpayment of tithe would have the full effect of a prescription in *non decimando*, though such a prescription is admitted not to be valid at law. Upon these short grounds we have come to the conclusion which I have already stated to your Lordships.

The Lord Chancellor (Lord *Lyndhurst*) said he entirely agreed with the opinion delivered by the Lord Chief Justice. The course of authorities was too uniform to justify their Lordships in departing from them on the grounds stated at the bar. A departure from them would lead to this conclusion; that, though a prescription in *non decimando* could not be insisted upon, yet a party would be enabled under another form, namely, by insisting on a nonexisting grant, lost by time or accident, to avail himself of precisely the same result as by the prescription in *non decimando*. Being

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of opinion that the decision of the Courts below was correct, he moved that their judgment be affirmed.

Lord *Brougham*:—I also concur with the learned Judges in their doctrine on this subject. It is not representing this case truly, in point of fact, to state that it is one in which the decisions in the courts of Westminster Hall have been in conflict, in which at one time, and down to the year 1796 or 1797, they were one way, and that since that period they have been uniformly the other. But supposing that all the courts in Westminster Hall, without any controlling power exercised by this House in reviewing the later decisions, had, for the last forty years, uniformly treated the subject in this way, I should say, even in that case, it would be a strong thing for your Lordships to reverse a doctrine standing upon a current of former decisions, which had been adopted by the judges as evidence of the law, which had been accepted by the profession, and acted upon by them in advising their clients, and which had been the foundation of many titles at present held under that supposed law. But that is by no means the case in point of fact; no such new law has been laid down since 1797; there is no conflict whatever of the earlier decisions with the later, when those come to be examined; they may appear to be in favour of the argument contended for by the Appellant, or against the right of the impropiator; but when they are examined minutely, in no one case can it be found, that even the presumption of a grant has been set up to defeat the right to tithes of the lay impropiator, any more than of a spiritual person, where there was a mere nonpernancy unaccompanied by any other matter. The case of *Medley v. Talmy* is the strongest of those cases, and in that case there had been a con-

veyance, of forty or fifty years old, of the lands in question as tithe free; and whoever holds that case to be in conflict with the decision in this, takes his account of it from the marginal note to the report, and not from the statement of the case in the context.

Agreeing with the learned Judges in their opinion, and in the grounds on which they have, through the Lord Chief Justice, stated their opinion, and also with my noble and learned friend, who has moved the affirmance of the judgment of the Court below, I deem it unnecessary for me to go into a comparison of those cases. Suffice it to say, that upon looking for the only case not cited at the bar, to which Lord Eldon alluded in *Berney v. Harvey*, as having been decided in the Court of Exchequer in 1727 against the law contended for, we find there is no distinct account of it to be gathered from what his Lordship said. Two cases have been suggested to me as answering the description, but when examined, neither of them does so. One is *Sweetapple v. Kingston* (x): it is impossible that can be the case, because that is principally a question of modus; the other, which a learned Judge suggested, is *Stone v. Rideout* (y); but when I look to that case, I find that it is wholly inapplicable, and does not at all answer the description, though it being in the year 1728, comes near the date of Lord Eldon's citation. We are, therefore, led to conjecture that there is no such case reported, for the industry of the Judges, and of the learned counsel at the bar, has not been able to discover it. It is said, that judges have doubted this law, that Lord Eldon, Lord Redesdale, Mr. Baron Wood, Lord Hardwicke, Lord Talbot and Lord Loughborough, have expressed similar opinions, and the whole weight

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(x) 2 Eag. & You. 1. (y) 2 Eag. & You. 6. S. C. Bunb. 262.



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of those doubts has been pressed upon your Lordships and upon the learned Judges who have assisted you, in the argument for the Plaintiff in Error. I think the inference presses the other way. What am I to say of the law, when I find such judges as Lord Hardwicke and Lord Talbot represented, (I do not know where, for I cannot find it in their own words,) but represented by Lord Eldon, in *Berney v. Harvey* as having "struggled much but ineffectually against it (z)." Is that not saying in terms, that the law was too strong for them. And the result of their doubts and struggle was, that they were defeated by the strength of the law, and that the decisions have been so uniform, and the law so clearly established, that they could not alter it. I have looked into Lord Redesdale's argument, in *Norbury v. Meade* (a), and a most strong and cogent argument it is, as Mr. Baron Wood's also is, in the particulars to which Lord Eldon refers. That argument amounts to this, that one cannot see why this should ever have been the law; that it rests on no sound principle; that the reasoning which applies to a spiritual rector does not apply to a lay rector. That is perfectly true; but there are many other cases in which a uniform course of decision has made the law and settled it; and although it originated in reasons which you cannot now discover, or where you see it originated in error, even then you cannot unsettle the law so established. A very recent case proves this strongly; I mean the case of *Cadell v. Palmer* (b), from which it is clear that the doctrine, that an executory devise is good for 21 years beyond a life or lives in being, originated in the consideration that an infant, not being of age until 21, could not bar the remainders over by suffer-

(z) 17 Vcs. 119. (a) 3 Bligh, 226. (b) 1 vol. *ante*, p. 375.

ing a recovery or levying a fine. Ever since the decision in the Duke of Norfolk's case, professional men have acted, and parties have purchased, not with reference to the infancy, and the difficulty of levying a fine or suffering a recovery, but with reference to this, that absolutely a man could entail his lands on lives in being, and 21 years after. And what have your Lordships held in *Cadell v. Palmer*? And what did the learned Judges all advise your Lordships to hold? Why, that a man could devise his lands for a life or lives in being, and that the executory devise was good, which added to the life or lives a term of 21 years, in gross, without reference to infancy at all. I put the question in that case to the learned Judges, with a view of setting it in the strongest manner, by excluding the infancy altogether. That is a remarkable instance where every person may see that a rule crept into the law *per incuriam*, and by a sort of mistake, easily explained, which, if we were to make the law now, we should not perhaps fall into, but which cannot be taken into account in order to impugn the authority of a train of uniform decisions.

I cannot conclude the observations which I thought it necessary to add on this important case, without remarking upon the course of argument pursued by the learned counsel for the Plaintiff in Error. He says, we are not bound by decisions of the Courts below, but we are only bound by our own decisions. If that were the case, we should have leisure to do nothing but to hear appeals and writs of error. We are not bound by the decisions of Courts of law; that is, we may, if we choose, do a wrong act, we may overlook the whole course of decisions in Westminster-hall. There is no doubt of that, because they have not the force of de-

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cisions in the supreme Court of Parliament, the last resort; but that we ought always to attend to decisions from inferior Courts, is evidenced by the circumstance, that in hearing this very case argued, we require the presence of the learned Judges in order that they may advise the House upon the question of law. If we are not to be influenced by the authorities of the Courts in Westminster-hall, why do we ask the Judges to tell us what our Journals could tell us. They cannot look into our Journals; they look into their own decisions and tell us their opinions on the authority of decided cases, and we hold that to be a great help and guide to us. A strong ground might be laid for holding a decision not to be law. The case of *Fitzroy v. Gwillim* (c), was for some years reckoned bad law, yet it was never actually overruled; and the same remark may be made on the case of *Corbett v. Poelnitz* (d). What is that but saying that, now and then, a wrong decision is made and then is set right, a proposition very different from saying there is a current of decisions all one way, a uniform course of decisions without any one exception. We cannot say there is any conflict of cases here.

The judgment of the Court of Exchequer Chamber was affirmed, without costs.

(c) 1 Term Rep. 153.

(d) 1 Term Rep. 5. *vide Marshall v. Rutton*, 8 Term Rep. 545.

# REPORTS OF CASES

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HOUSE OF LORDS,

ON APPEALS AND WRITS OF ERROR.

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## APPEAL

FROM THE COURT OF SESSION.

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April 1, 2. 10.

The Provost, Magistrates, and Town-  
Council of the Royal Burgh of DUN- } *Appellants.*  
BAR - - - - - }

Her Grace MARY, Duchess-Dowager of  
ROXBURGHE, and Others, Landward } *Respondents.*  
Heritors of the Parish of DUNBAR. }

In a parish comprising a borough and a district of land, the management and maintenance of the poor in the landward district cannot be separate from the management and maintenance of the poor in the borough, but the poor of both must be regarded as the poor of one parish, and indiscriminately entitled to aid from the parish funds.

*Maintenance  
of the Poor.  
Construction  
of Statutes.  
Force of Usage.*

Long usage is of no avail against plain statutory enactments, and it can be binding on parties only as the interpreter of a doubtful law, and as affording a cotemporaneous exposition. Where a statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with express directions of the statute.

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THE general question in this appeal was, whether in a parish, comprising a town and lands of large

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extent, the poor in the landward district could be disjoined from the poor of the town, for the purpose of their maintenance, and the town funds be made exclusively liable to maintain the poor residing within the town.—It appeared from the pleadings, that the parish of Dunbar, in the county of Haddington, consists of an extensive district, having situated therein the royal burgh of Dunbar. The valuation of the landward part of the parish is 16,993 *l.* (Scots), the burgh or municipality being proprietor of land valued at 30 *l.* (Scots), exclusive of the royalty. The total population of the parish was found, by a census taken by the incumbent thereof in 1822, to be 4,945, of which number, 3267 resided within the burgh, and 1678 in the landward district. The parties to the appeal had, in the first proceedings taken by them, differed in their statements of the number of poor in the town and country part of the parish, the Respondents stating, that there were 70 within the town and 29 in the country, while the Appellants insisted that the poor amounted altogether only to 80, and that 52 of them resided in or belonged to the landward district, and 28 only belonged to the burgh; but a committee appointed by joint consent in 1834, for the purpose of ascertaining the exact number of poor in the whole parish, and the proportions in town and country, with a view to this appeal, reported that, “103 persons were then on the regular list of poor, receiving aid from the poor’s fund of the parish, 86 of whom were settled within the burgh, and 17 in the landward district, but of those within the burgh some were decayed or unemployed farmers’ servants. Fifty of the whole number were born and brought up in the burgh, 10 in the landward district, and the remaining 43 came from other parishes.” The population of Dunbar

being chiefly seafaring persons subject to various casualties; the number of the poor there is necessarily greater than among an agricultural population of the same extent; and that circumstance, together with the recent breaking up and abandonment of a cotton manufactory in the town, by which several persons who had come thither from other places, were put out of employment and dispersed through the town, increased considerably the disproportion between the town poor and the landward poor. The funds for the maintenance of the whole poor, both of the burgh and landward district, under the administration of the kirk-session, consist partly of a small charitable donation, of collections at the church-door, and incidents at marriages, baptisms and funerals; but the greater part is supplied by assessments voted by the heritors or owners of the land and their tenants, and by contributions from the town, in definite proportions of five-sixths from the heritors, for which they assess themselves, and one-sixth from the town or community of Dunbar, in the name of cess, poor rates and other burdens from traders and proprietors within the burgh.

In the year 1823 the heritors objected to that mode of assessment as laying an unequal and unjust burden on the landward part of the parish; and in 1824 they came to a resolution that in future distinct assessments should be made for the burgh poor and the country poor, and levied from the burgh and from the heritors in the landward district separately, so that each should support its own poor. The provost and town-council objected to the proposed alteration, and after several attempts at a compromise, from 1824 to 1830, the heritors raised an action against the provost, magistrates and members of the town-council, and also

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against the members of the kirk-session of the parish, as joint administrators, with the heritors, of the poor's funds. They stated, in their summons, that by the statute of 1579, cap. 74 (the foundation of poor laws in Scotland), "for punishment of strong and idle beggars and relief of the poor and impotent," it is ordained, "that the provosts and baillies of ilk borough and town, and the justice constitute by the King's commission in every parish to landwart, shall (within the time mentioned) take inquisition of all aged, poor, impotent and decayed persons, born within that parish, or who were dwelling and had their most common resort in the said parish the last seven years, &c., and upon the said inquisition shall make one register book, containing their names and surnames, to remain with the provosts and baillies within borough, and with the justice in every parish to landwart, &c.; all poor people within forty days to repair to their own parishes; and the said space of forty days being bypast, that then the provosts and baillies within boroughs, and the judge constitute by the King's commission in ilk parish to landwart, make a catalogue of the names of the said poor people, inquire the men and women where they were born, and thereupon, according to the number, to consider what their needful sustentation will extend to every oulk; and then, by the good discretions of the said provosts, baillies and judges in the parishes to landwart, and such as they shall call to them to that effect, to tax and stent the whole inhabitants within the parish, according to the estimation of their substance, without exception of persons, to such ouklike charge and contribution as shall be thought expedient and sufficient to sustain the said poor people; and the names of the inhabitants stented, together with their taxation, to be

likewise registrate ; and that, at their discretion, they appoint overseers and collectors in every burgh town and parish, for collecting and receiving of the said oulkie portion, who shall receive the same, and deliver so much thereof to the said poor people, and in such manner as the said provost and baillies within borough, and judges in the parish to landwart, respective, shall ordain and command, &c. ; and at the end of the year, that the taxation and stent-roll be always made of new, for the alteration that may be through death, or by increase or diminution of men's goods and substance." That, by subsequent statutes, the powers previously committed to the judges in parishes to landwart were transferred to the heritors and kirk-session. That, by proclamation of William and Mary, 11th August 1692, " the heritors, minister and elders of every parish are required to meet on the second Tuesday of September next, at their parish kirk, and there to make lists of all the poor within their parish, and to cast up the quota of what may entertain them, according to their respective need ; and to cast the said quota, the one-half upon the heritors, and the other half upon the householders of the parish, &c. ; and the lieges are charged to apprehend beggars, and forthwith to carry them to the principal heritor of the parish where they were apprehended, if it be in landward, and to one of the baillies in towns." That by proclamation, 29th August 1693, their Majesties " require and command the magistrates of our burghs royal to meet and stent themselves, conform to such order and custom used and wont, in laying on stents, annuities or other public burdens, in the respective burgh, as may be most effectual to reach all the inhabitants ; and the heritors of the several vacant parishes likewise to meet and stent themselves for the main-

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tenance of their said respective poor, and to appoint the ingathering, uplifting and applying of the same for the uses foresaid, sicklike and in the same manner as the heritors and elders are appointed by our former proclamation. And for preventing of any question that may arise betwixt the heritors and kirk-session in the several parishes of this kingdom, about the quota of the collections at the church doors, and otherwise, to be made by the said session, to be paid in to the heritors for the end aforesaid, we do hereby, with advice foresaid, determine the same to be half of the said collections." That by proclamation of King William, 3d March 1698, it is further provided, that "because there may some questions arise in putting the said Acts in execution, for which there can be no general rule set down, power and warrant are given to the ministers and elders of each parish, with advice of the heritors, to decide and determine all questions that may arise in the respective parishes, in relation to the ordering and disposing of the poor, in so far as it is not determined by the laws and Acts of Parliament." That the foresaid proclamations were confirmed by Acts of Parliament, and that these different enactments draw a distinct separation, as to the assessment and management of the funds, betwixt burghs and parishes to landward, giving the whole power and management, in the one case to the provost and magistrates, and in the other to the Judges, in whose place are now substituted the heritors and kirk-session; and they are quite inconsistent with the supposition, that in any parish the provost and magistrates, and the Judges, were to be conjoined in assessing or distributing the funds. That, consequently, in the case of a burgh situated in a landward parish, the provost and magistrates have, by law, the sole charge of the poor of the

burgh, while the Judges have the sole charge of the assessment and management for the poor of the landward district, &c. That an agreement, alleged to have been entered into in 1724, according to which the assessments for the poor have been made, was of the following import: "It is agreed by the heritors that for making foresaid sum (120*l.*) effectual for maintaining the poor of the town and parish of Dunbar, five sixth-parts of the said sum shall be paid by the heritors and tenants of the country part of the parish, and one-sixth part by the town of Dunbar and the community thereof, and that for one year alternately; and that this agreement be binding no longer, or be a precedent any manner of way for the future." That, admitting the genuineness of this agreement, still it did not continue or purport to continue in force more than the year, and the mode of assessment contained in it was unequal and contrary to law, inasmuch as the whole inhabitants of a parish must contribute to the support of the poor equally according to their substance, whatever usage to the contrary may have prevailed. That, therefore, it "ought and should be found and declared by decree of the Lords of our Council and Session, that the management and maintenance of the poor of the landward district, and of the burgh, are separate and distinct, and that the pursuers, as heritors of the landward district, with their tenants, and other inhabitants thereof, are not liable for the support of the poor of the burgh, but for that of the poor resident within the landward district alternately; and the said provost, magistrates and council, as representing the community of the said burgh of Dunbar, ought and should be decerned and ordained, by decree foresaid, to sustain and manage the poor of the said burgh according to law. Or

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otherwise, in the event of the pursuers failing in the above conclusion of their action, then in that case it ought and should be found and declared, by decree foresaid, that the power of taking up the lists of the aggregate poor, determining the assessments and managing the funds, belongs to the meeting of heritors, provost, minister and elders ; and that the assessments to be imposed for the support of the aggregate poor shall be laid on the whole inhabitants of the parish equally, whether in burgh or to landward, according to the estimation of their substance, without exception of persons."

The Appellants, in answer to the allegations in the summons, insisted that it had never been the practice, in the parish of Dunbar, to separate the poor into two classes, viz. the poor residing within the landward district, and the poor resident within the burgh, or to hold the heritors, tenants and other inhabitants of the landward district, liable only for the support of the poor resident within that district, or to liberate them, in any degree, from an universal liability, along with the other parishioners, for the poor of the whole parish. It had, on the contrary, been the invariable practice, for more than a century back, to have but one assessment for the entire parish, leviable on the general body of the parishioners, and distributable among the whole poor of the parish, whether in burgh or to landward, without distinction of persons, and on a principle of the most perfect equality. They admitted that for the more convenient levying of this assessment, a distinction had so far existed between the burgh and landward districts, that the aggregate assessment laid upon the parish had been raised in distinct proportions from these two districts; the burgh, for more than a century back, paying one-

sixth of the entire assessment, and the landward district taking the burden of the remaining five-sixths. They stated their belief that this arrangement, in its origin, had been founded on a comparison of the real or valued rent of the two portions of the parish. It was, in 1724, as it had been on other previous occasions, made matter of positive contract. And as there had been no interruption or challenge of the arrangement, from 1724 down to the present day, it had been universally recognised and acted upon in the parish, as the *regula regulans* in levying the parochial assessment. Moreover, so far as the proper town poor were concerned, the burden on the parish was lessened, there having been, so far back as 1753, specially mortified in favour of the poor within burgh, a sum of 1,500 merks Scots. A settlement to this effect was duly executed by one Jane Binning, in March 1753 and stood recorded in the burgh books. The session and heritors annually intromitted with the interest accruing on this investment, and they applied this fund, as well as another derived from the burgh mortcloths, for the general behoof of the whole poor of the parish. Besides the resident poor of the parish, there was a great number of stranger poor, to whom occasional aid was required to be given. There never had been but one assessment in the parish in name of poor's rate, and there never had been a separation of that assessment into two distinct funds, one applicable to the landward district, and the other to the burgh; nor a separation of the pauper population into two distinct classes of landward and burgh poor. On the contrary, the fund raised within the parish for support of the poor had invariably been levied and dealt with as one indivisible parish fund, in reference to which, the whole poor of the entire parish, whether within

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burgh or to landward, had been admitted to equal rights; and from which no class of that poor had ever been excluded, in respect of a supposed preferable right in any other class.

Before the cause was prepared for debate, another action, involving similar questions in regard to the royal burgh of Lanark, had come before the second division of the court of session, (in which division this action also was pending,) and their lordships of that division had ordered the opinions of the other judges to be taken thereon. Their opinions were accordingly taken in that case, and afterwards in this, six (*a*) of them giving substantially the same opinion in both cases, viz., that there can be but one list or roll of poor in any parish, whether entirely burghal and entirely landward, or partly burghal and partly landward; and that there cannot be two lists or rolls, one of burgh poor and the other of country poor; but that they are all indiscriminately the poor of the parish, and entitled to relief out of the whole funds of the parish. That as there is no rule laid down by any of the acts for mixed parishes, partly landward and partly burghal, each parish of that description ought to continue to follow the rule of assessment used and wont; and therefore as there has been a rule acted upon in the parish of Dunbar for a great length of time, they were of opinion that that rule of assessment ought to be continued.

Three of the judges (*b*), on the other hand, were of opinion, that the management and maintenance of the poor in the royal burgh and in the landward district, were separate and distinct, under the

(*a*) The Lord President, Lords Balgray, Gillies, Corehouse, Fullerton, and Moncrief.

(*b*) Lords Craigie, Medwyn, and Mackenzie.

control of the magistrates in the one, and the heritors and kirk-session in the other; and that the assessment was leviabie according to totally different rules, as specifically laid down in the statutes for burghs and landward parishes respectively.

The two causes came to be finally advised by the second division on the 4th of July 1833, when their lordships of that division (c), four in number, unani-

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(c) Lord Justice Clerk expressed his opinion to this effect:— Six of the consulted Judges are of opinion, that the usage ought to fix the rule of assessment in the burghs of Lanark and Dunbar. The other three Judges who were consulted, have delivered a different opinion, founded entirely upon the interpretation of the statutes which ordain an assessment for the maintenance of the poor. With these conflicting opinions before me, I have given the point the fullest consideration; and, after having weighed all the arguments for and against, I must confess that my opinion coincides with that of the minority. I cannot discover on what principle usage can or ought to be introduced as the rule of the assessment. The provision for the poor, and the powers to impose the assessment, are the mere creations of statute. There is here no case of very ancient usage. But although the usage had been long and inveterate, I can see no ground for deciding that it is to be imperative or binding on the parties liable to an assessment. The usage may continue from generation to generation—the country may not complain of the usage, and the assessment may be imposed and levied for a long time undisturbed—but when any one becomes refractory, and calls in question the right or mode of assessment, we must recur to the statute. In my view of the question, usage, however continuous, establishes no right. In this state of matters we are driven back to consider the question, What is the state of the law under the statute, with regard to a mixed parish? The enactments relate to two different sets of poor, and to two distinct localities, a royal burgh, and a parish to landward. In the case of a burgh, the rule applies to every burgh which has a provost and magistrates. This is the clear provision of the Act 1579. That Act, as well as the proclamations, are recited in the statute of 1698; and in truth the Act 1579 is the very origin and basis of our system of poor laws; it lays down a clear code of

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mously concurring with the minority of the consulted Judges, the following interlocutor was accordingly pronounced :—" The Lords having resumed consideration of this cause, with the opinions of the consulted judges, decern and declare in terms of the first conclusion of the pursuers' libel, and remit to the Lord Ordinary to proceed accordingly."

regulations, both for the burghs and the landward parishes. The burghs are those which have a provost and magistrates, no matter how many parishes they are divided into. A distinct mode of assessment for the poor is provided by it. It provides how the lists are to be made up—it contains certain regulations as to begging—and it clearly defines the management by the magistrates. As to a parish to landward, the Act confides the power of assessment to a Judge constituted by the King's commission. But this was afterwards so far altered, that the powers and duty of the Judge were devolved on the heritors and kirk-session by 1597 and 1672. Then again we have, on the one hand, the proclamation of 1692, by which the heritors and kirk-session of landward parishes are to assess themselves for the support of the poor; and on the other hand, the proclamation of 1693, by which the magistrates of the burghs are empowered and required to impose the assessment. So that it appears to me there is a clear distinction between the poor themselves, the assessments, the management of the funds, and the provisions for the maintenance of the poor. With regard to the burghs, the rule extends to all royal burghs, whether they have any landward territory or not, although it is not so with the burghs of barony, which are in this question to be treated as villages. There is no express notice in the statutes or proclamations of, nor are there any provisions for, mixed parishes. They apply to the poor of the burgh and the poor of the landward parishes respectively. To me it is plain, that they lay down two systems of management which are quite distinct. When a usage has been established, it may be convenient to follow it; but whenever a question is stirred as to the matter of right, we must give effect to the law as we find it. We must, in this case, steer by the law as we find it in the statutes and proclamations. I am of opinion with the minority, and would propose in regard to Dunbar to find in terms of the first conclusion of the declarator.

Lords Meadowbank, Cringletie, and Glenlec, concurred.

The appeal was from that interlocutor.

The Solicitor-General (Sir *William Follett*) and Mr. *Murray* for the Appellants:—

The law of Scotland relative to the maintenance of the poor, proceeded entirely upon a parochial system, the whole poor within each parish forming one class, to be provided for indiscriminately out of the whole funds of the parish; and there is nothing in the statutory enactments, upon which alone the poor-law is founded, either in ordinary construction, or as they have been explained by usage, which sanctions, in any case, the division of the poor of one parish into separate and distinct territorial classes,—such as the burgh poor and the landward poor in the case of a parish partly burghal, and partly landward,—or authorizes the formation of a separate list or roll of paupers to be made up with reference to such territorial division, or directs provision to be made for their maintenance out of distinct and separate funds.

While the immediate administration of the poor-laws is entrusted to the magistrates of royal burghs in parishes entirely burghal, and to the heritors and kirk-session in parishes entirely landward, the separate powers thus conferred upon the magistrates of royal burghs, on the one hand, and the heritors and kirk-session on the other, even if understood to be conferred in the case of a parish partly burghal and partly landward, ought not to disturb the primary principle of the poor law system, namely, that it depends upon a parochial arrangement; and there is no necessity, still less ground or authority,—even assuming such separate jurisdiction within the same parish,—for establishing two separate lists of poor, to be

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separately provided for out of separate and independent funds.

The case of Peterhead, decided upon appeal to this House in 1802, is applicable to this question. In that case, where out of a population of 4,371 persons, about three-fourths resided in the town, the other fourth being resident in the landward part of the parish, a question arose as to how the burden of building the church should be borne by the heritors, upon whom generally that burden is imposed by the law of Scotland. The Court of Session gave effect to the argument, that the expense of building that part of the church, which was necessary for accommodating the landward part of the parish, should be separately defrayed by the heritors in proportion to their valued rents, and that the expense of building that part of the church necessary for accommodating the town should be defrayed by the fuars and proprietors of houses within the town according to their real rents. This House reversed that judgment of the Court of Session, and declared that the charge of building the church was a parochial duty, which ought to be borne by all the owners of lands and houses in proportion to their real rents. And Lord Chancellor Eldon, in moving that judgment of reversal, observed, that "the expense of building or repairing a parish church was a parochial burden, which ought to fall on the property of the parish, and should not be regulated by reference to the population in different parts of the same parish." That case presented a very plausible ground for apportioning the burdens of the parish according to the population, yet it was there held, that the relative extent of population gave no rule. No absolute rule having been laid down by any statutory enactment for the

case of a parish partly burghal and partly landward, and a rule of assessment having existed in this parish of Dunbar for more than a century, there is no reason to disturb such a rule of assessment, as regards its principle at least, far less to introduce a rule which has never been recognised in this or any other parish, making different portions of the parish liable for the support of the poor, in proportion to the population, or to the number of paupers in each of those districts respectively.

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Dr. *Lushington* and Mr. *Keay* for the Respondents:—Compulsory assessments for the support of the poor rest entirely on statutory enactment, and can neither be extended beyond nor exercised differently from what is prescribed by the statutes and ratified proclamations. By these statutes and proclamations, the management and maintenance of the poor of royal burghs is totally distinct and separate from that of the landward portion of the parish in which the burgh is situated. Express provision is thereby made for the maintenance and management of the poor of all royal burghs under the exclusive jurisdiction of their own magistrates, separately and distinctly, without reference to any landward district not within the burgh. Express provision is thereby in like manner made for the separate maintenance and management of the poor of landward parishes having a royal burgh situated therein, under the exclusive jurisdiction of the heritors and kirk-session thereof, independent of such burgh. A conjoint management and system of maintenance of the poor of the landward district and royal burgh is not only unsanctioned by the statutes and proclamations, but cannot be carried into effect without a direct and

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open violation of all their most important provisions. While the system for the support of the poor is, in so far as regards the landward parts of the country, parochial, in so far as regards the royal burghs it is strictly and exclusively burghal in all its parts,—its machinery, its rules of assessment, and its extent; on the one hand extending over the whole burgh, although containing several separate parishes, and on the other, limited to the bounds of the burgh when situated within a parish. The landward districts of parishes containing royal burghs are included under the provisions in the statutes regarding landward parishes, the royal burghs being excerpted therefrom, and erected into separate districts relative to the poor, under a management peculiar to themselves, and exclusive of the landward parish. The case of Peterhead has no application here. That was not a royal burgh, but a burgh of barony, which is to be deemed equally landward with the rest of the parish in which it is situated.

There is no general consuetude to affect the construction of the statutes as to this matter, and no length of usage in a particular place can prevent the heritors and kirk-session of a parish, or the magistrates of a burgh, from reverting even from one legal mode of assessing for and maintaining the poor to another; and still less can it prevent them from turning from an illegal mode to one sanctioned by law: *Dick v. Fleshers of Stirling* (d). The practice in Dunbar, originally adopted as matter of special agreement, is contrary to law, and produces the greatest inequality and injustice.

April 10.

Lord Brougham :—The parish of Dunbar, which

(d) 5 Shaw & D. 268.

is of great extent, consists of the royal burgh of that name and a country or landward district. The population of the borough is about 3,200, and of the landward part nearly 1,700. The management of the poor is admitted to have been for above a century on its present footing, and there is no evidence of any other kind of management at any time. Both parts of the parish, the burgh and landward district, have been considered as one, without any division or difference of system or separation. There has been but one assessment laid upon the whole parish, and no distinction has been made of the poor into two classes or parties, the burgh poor and the landward poor, nor has any separate list or roll been ever made up of the two classes. The one sum assessed having been each time ascertained, the usage has been to distribute it into two portions, one-sixth to be levied in the burgh, and five-sixths in the landward part of the parish; but when received, the whole has been uniformly treated as one fund, and distributed as such among the whole poor, without any distinction. In like manner the kirk-door collection has been one for the whole parish, and in all questions of settlement a distinction has never been made between the two parts of the parish. There is some discrepancy between the statements of the parties to the appeal as to the proportions of the poor in the burgh and in the landward part. The one states the burgh poor at seventy and the landward at thirty, while the other gives the proportions as sixty to forty. But it is clear that the numbers of poor actually residing within the burgh must not be taken as a fair criterion of the proportion of persons thrown upon the parish funds by the two districts; for many of the poor who now live in the burgh are

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labourers formerly employed in the country, while many of the persons at all times working in the country are resident in the burgh. It is accordingly stated, and I do not find this explicitly denied, that nearly one-half, certainly more than one-third, of the poor residing in the burgh were formerly country labourers, independently of those who always lived in the burgh while working in the landward part.

In these circumstances, which compose the whole facts of the case, the Respondents, who are the heritors of the parish, naturally enough felt desirous, if they could, to shift upon the burgh the maintenance of its own poor, reckoning all to be burgh poor who reside within its bounds, although a great number of them belong properly to the country district. This desire they have in common with every part of a district which has a population of varying density, and a wealth distributed in proportions not at all relative to the number of inhabitants. There are many parishes in Scotland, as well as in England, in which eight or ten thousand persons are crowded into one corner, while not one thousand occupy the rest of the parish, and the wealthy part, being that which is thinly peopled, has to pay by far the larger share towards maintaining all the paupers that belong to the smaller and poorer district; and there is not one such parish which has not as good right as the heritors of Dunbar to complain of the irregularity in the distribution of the burthen. Such complaints, if listened to and acted upon by the Legislature, would lead to the most unjust divisions of the country. Indeed they would soon render all divisions into districts impossible. The question here is, however, not what would be admissible had we the law to

make anew, but what the law now is ; not what right the Dunbar heritors have to complain, but what legal redress there is for their alleged grievance.

The question then which was raised before the Court below, and is now brought before your Lordships by appeal, is, whether or not the parish of Dunbar is by law divisible, or rather divided, into two districts, *quoad* the management of its poor, one of these districts being the royal burgh under the magistrates, and the other the landward part under the minister and kirk-session. The Court below, on consultation of all its Judges, held that it was so divided, and pronounced its decree to that effect, the claim of repetition being given up by consent. But this decision was made by the narrowest majority, and learned Judges of great eminence gave their countenance to both the opinions entertained. Upon a careful consideration of the whole case, I am of opinion that the judgment of the smaller number was right upon every principle of sound construction which can be applied to the statutes, and upon all the established general views of law which can govern questions of this description.

It is admitted, that there are no authorities, either of text writers or decided cases, which can be resorted to for our guidance in this question ; we must attend to the statutory enactments, to the principles which are applicable to such provisions in a case of this kind, and to the usage in this parish as well as in almost all the rest of Scotland.

It is most justly observed by the Lord Justice Clerk, that the provisions for the poor and the powers of assessment for their relief, are the mere creations of statute. Every thing then must, in respect to these important matters, turn upon the statutory enactments. But I cannot go along with his Lordship, when for

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this reason he denies that usage, however long and inveterate, could be binding and operative on the parties. It can be binding and operative upon the parties only as it is the interpreter of a doubtful law, as affording a contemporary interpretation; but it is quite plain that, as against a plain statutory law, no usage is of any avail. But this undeniable proposition supposes the statute to speak a language plainly and indubitably differing from the purport of the usage. Where the statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions, where any are given; or where the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed rule, *optimus legis interpres consuetudo*, which is sometimes termed *contemporanea expositio*; and where you can carry back the usage for a century, and have no proof of a contrary usage before that time you fairly reach the period of *contemporanea expositio*.

Let us now look to the statutes, and the first and leading one, on which all turns, is the Act of 1579, cap. 74 (Scotch). The preamble, referring to the older Acts, is chiefly remarkable as reminding us that by those still earlier provisions all the arrangements touching the poor were of a parochial nature, and bore immediate and constant reference to parishes. No other boundary of districts is by them recognised. The Act of 1579 itself pursues the same course, and regards no division but that of parishes, unless in the case of burghs; that is, of a parish or parishes wholly burghal; and the reason why it specifies this latter case and provides for it is, not so much to deviate from the principle of regarding only parochial boun-

daries, as to save the jurisdiction of magistrates within their own peculiar province — the royal burgh over which they preside. Thus the first enactment relates to vagrants and sturdy beggars, among whom we comprehend bards; these are to be carried before the magistrates in burghs; and in landward parishes, before justices to be appointed, or lords of regality: that is, the magistrates in burghs, and the justices and lords of regality in landward parishes, are to punish the offenders, or to take security for their conduct. The other provisions respecting vagrants are to the like effect as regards the burgh and landward parishes; with this additional circumstance, that they never once mention the burgh magistrates or burgh jurisdiction as applicable to provisions made both touching burgh and landward parishes, while once or twice, probably *per incuriam*, parish alone is mentioned, and parish jurisdiction; although it seems plain the burgh jurisdiction must be supplied for burgh parishes. This is only worth observing as evincing how much more parochial division was in contemplation of the Legislature than any other, even where parishes wholly burghal were in contemplation.

The rest of the Act is framed on the same plan. Registers or lists of the poor are to be made by inquisition taken by the magistrates of each burgh and town, and by the justices appointed in every landward parish; and the lists are to be kept by the magistrates in each burgh, and the justice in each landward parish, and all the poor are required to repair to the parish where they were born, and there settle themselves, under pain of being deemed vagrants. They are not to return to the burgh or town, but to the parish, because parochial division is the thing mainly

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regarded throughout the Act, and a burgh may have more parishes than one. Here let us only observe, that in case a pauper was born in a parish partly burghal, partly landward, he complied with the statute, and escaped the penalty by resorting to and abiding in any part, burghal or landward, of the parish; but if he was born in one of two burgh parishes, he was liable to the penalty if he resorted to the other, though still he would be in the same town. The construction which would raise a distinction between the landward and burgh parts of the same parishes, must admit that a pauper born in the landward part, might safely return to and settle in the burgh part, and then he would encumber the burgh fund, and so *vice versa* of one born in the burgh part of the parish. Now, if the division contended for by the argument of the Respondents has any meaning at all, it is that the landward poor should be sustained by the landward part, and the burgh poor by the burghal part of the parish, but that is rendered impossible by this provision respecting their several settlements. If again, to escape from the force of this consideration, it be said that the landward born poor must resort to the landward parts of the parish, and the burgh born poor to the burgh parts, I ask what provision of the Act hints at such a distinction in respect of settlement? But the matter here dealt with is of a penal nature, and highly penal, for vagrancy may terminate, by the first provision of the Act, in even capital punishment; therefore, this provision relating to settlement must be most strictly interpreted, and consequently we are not at liberty to supply by intendment a provision which is not in any way to be found in the Act; namely, that persons having a landward settlement by birth or seven years'

residence, shall go to the landward part, and those having a burgh settlement to the burgh part; the exigency of the Act is clearly complied with by the party returning to any part of the parish.

To illustrate this point further, let us suppose a pauper brought before the burgh magistrates as a vagrant, and indicted for that offence, his vagrancy consisting in having continued out of his parish, where he was born or had lived seven years last past, above forty days after the proclamation; the indictment must follow the section which constitutes the absence a constructive vagrancy, and the very words must be used. The averment must be, or rather must have been,—for it could have happened only immediately after the Act passed, for it relates to that period,—the averment must have been, that the defendant, being born within the parish of Dunbar, and not having lived during seven years last past in any other parish, and being a pauper, did not return and repair to the said parish, and there settle himself within the space of forty days after proclamation made of a certain Act passed in such a year, &c. Now if the pauper had been in the country part and returned to the burgh part, he must have been acquitted, for the material averment of the indictment would be negatived by the evidence. No consideration of burgh or landward would ever have been had. The same may be said of the remaining provisions. The lists are to be made by the magistrates for towns, and by the justices for landward parishes; and the magistrates and justices in the parishes to landward, are to tax and stent the whole inhabitants within the parish according to their substance, and distributions are to be made among the poor by the magistrates within the burgh, and the justices in the parishes to landward

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respectively; this being the only place in which any words of severance occur in any part of the Act. So testimonials are to be given by magistrates in towns, not distinguishing parishes, and by the justices in parishes to landward, manifestly in order to enable the magistrates to certify for all the parishes within the town indiscriminately. The subsequent Act laid the duties formerly assigned to justices upon the kirk-session, and the proclamations in the reign of William and Mary follow nearly the same course, only inclining more to the construction which lays the duty upon the parishes merely. In all these provisions then, we can discover only one case in which the bounds of the royal burgh and the jurisdiction of the magistrates is recognised; one case only in which there is a distinction taken between burghal and landward, and that is the case of a parish or parishes wholly burghal, and a parish wholly landward. This is no exception at all, the general principle of parochial division followed throughout the Act, for that division is here too strictly preserved; but no provision whatever is made, no notice at all is taken of a parish partly burghal and partly landward. It is considered, therefore, as a parish, and dealt with as such. The silence of the Act on this case is quite decisive, and we have no right to speak for it. When we see nothing recognised throughout but parochial boundary, we can have no right to imagine another division of landward and burghal district: burghal and landward are indeed terms used, but how used? Not as designating parts of the same parish, but as denoting two different kinds of parishes.

There is notice taken of and provision made for a burgh which is a parish, or it may be two parishes, though that is only in one or two instances. There is

likewise notice taken of and provision made for a landward parish; but no mention at all seems to be made, nor is anything at all rested upon the distinction between that part of a parish which is burghal, and that which is landward. We should be introducing a perfectly new matter, if we supposed any such division to be made; we should be really inventing a kind of district or territory wholly unknown to the law. The law is conversant with parishes. It is our most ancient division of territory, and loses itself in the most remote antiquity in every part of the island, being in England and in Scotland far beyond the time of legal memory. The law is likewise conversant with burghs, and their bounds are ascertained, though, generally speaking instituted in much more recent times. But that portion of the territory which is in a parish and not in a burgh, is wholly unknown to the law as contradistinguished from the rest of the parish. It is a part of the parish, and known as such, that is, known in relation to the parish; but we have no name even, much less a legal description of such a district. To maintain any such distinction, any such district, is contrary to all legal principle, and is, indeed, arbitrary and gratuitous. Equally so—perhaps still more violent—is the supposition which would give birth to a new jurisdiction, extending over and limited to such a district. The magistrates have their known jurisdiction in burghs, the kirk-session in parishes; but we are called upon to create a jurisdiction and to vest it in the kirk-session, comprising it within certain limits wholly unknown to the law. It is the jurisdiction of the kirk-session over that part of a parish which falls beyond the bounds of a town, but which is situated in the parish. This intention might be accomplished, the jurisdiction might be conferred, the district created,

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and, its bounds being defined, the jurisdiction might be extended over that district, and limited by these bounds. The Legislature might have done this, and it may now do it. If it had been so, there would have been an end of the question. The statute would have said so, and that would have been enough. But it must have said so expressly and plainly; no conjecture and no constructive reasoning can supply any such thing; nay, such a division of territory, and such a creation of jurisdiction, is exactly the last thing that we are at liberty to fancy, or to imply; at the same time, if for a long course of years the poor of the parish of Dunbar had been managed, as to assessment, settlement and sustentation, in two divisions, and the parish had thus been divided as it were into two, for the management of the paupers; and if the same kind of division and double administration had been uniformly followed in all, or almost all the other mixed parishes of Scotland, I am not disposed to deny that this would have entitled us to impose a construction upon the Act according to the practice or use. There being nothing absolutely self-repugnant in the division, we might have limited the case of a mixed parish, as not omitted, but capable of being raised by construction—a somewhat forced construction certainly—on the words of the Act, but raised solely by the usage being of a contemporary date, and of an uniform kind. That, however, is not the case here, and the Act therefore must be construed according to its plain intent, which excludes all such new divisions as the Respondents contend for, and the decree appealed from adopts. With this I should probably have been satisfied, but the case is considerably stronger; for the usage, both in Dunbar and elsewhere, is plainly with the construction contended for by the Appellants. It

would be a strong thing indeed to alter a practice so long established in this borough, upon any speculative construction of the statute. But when we find that the same usage which prevails here, has also prevailed almost every where else, it would be overlooking that which would have been a very important aid in the construction of a doubtful provision, and that which is a strong confirmation of the construction naturally put upon a provision by no means doubtful, were we to leave out of view the additional weight which this usage gives to the arguments against the decree of the Court below.

I have no hesitation, therefore, in recommending to your Lordships to reverse the interlocutor complained of.

Ordered accordingly, “ that the interlocutor complained of in the said appeal be and the same is hereby reversed ; and it is further ordered, that the cause be remitted back to the Second Division of the Court of Session, in order that the said Court may proceed further in the said cause as shall be just and consistent with this judgment.”

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## APPEAL

FROM THE COURT OF SESSION.

The Rev. Dr. JOHN INGLIS, and Others - *Appellants*.THOMAS MANSFIELD - - - - - *Respondent*.*Bankruptcy.*  
*Undue*  
*Preference.*  
*Costs.*

W. lent money on the security of an estate, which he believed, on the representation of the borrower, to contain 95 acres, and to be ample security for the sum lent. The borrower, after paying the interest of the loan for four years, became bankrupt, and the trustee on his sequestrated estate discovered that the description of the lands charged in security to W. did not comprise more than six acres. W. being advised of the objection to his security, applied to the bankrupt, and obtained from him a corroborative and supplemental bond, reciting the former deed, and subjecting the whole 95 acres, as originally intended, to secure the loan, and W. obtained infeoffment on this latter security before the trustee in the sequestration completed his feudal title. HELD, by the Lords, affirming the interlocutor of the Court of Session, that the supplemental bond was void as against the trustee.

The rule with respect to costs in the House of Lords, as in the Privy Council, and in Chancery, is, that one cannot appeal for costs alone, but if an appeal be brought on the merits—not on colourable grounds of appeal, for the purpose of raising the question of costs—the House will not treat that as an appeal for costs, but will even, in affirming the judgment of the Court below, consider the question of costs as fairly raised, and where there is hardship on the Appellant, will reverse so much of the judgment of the Court below as gave costs against him.

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IN the month of November 1823, Josiah Walker, then Professor of Humanity in the University of

Glasgow, since deceased, employed Mr. Joseph Gordon, W. S., to lend out for him the sum of 6,000*l.* on heritable security. Mr. James Stuart, of Dunearn (a friend of Mr. Gordon), wanted at the time a loan of from 10,000*l.* to 12,000*l.*, on the security of his estate of Hillside, which appearing to Mr. Gordon to afford an adequate security for the sum wanted, he entered into a treaty for the investment of Professor Walker's 6,000*l.*, and of two other sums of 3,000*l.* and 1,500*l.*, for other clients, Colonel Sutherland Sinclair and Misses Ramsay. The estate which Mr. Stuart thus offered as security for the proposed loan, was represented by him as extending to ninety-five acres, comprehending all the grounds then belonging to Mr. Stuart about his house at Hillside, and known by the general name of Hillside. Mr. Gordon was, throughout the negotiation, led to believe, and he did believe, that the security would comprehend the whole of the lands; but before coming to any final resolution, he got from Mr. Stuart a valuation of the lands, framed by Dr. Coventry, on the employment of Mr. Stuart, with the view to the intended loan. That document was thus headed: "Contents and estimated value of the lands, plantations, &c., of Hillside, belonging to James Stuart, Esq., and lying in the parish of Aberdour, and shire of Fife;" the domain lands, east of the road, were stated to contain 59 acres, and were valued at 12,559*l.* 10*s.*; the lands west of the road, containing 36 acres, were valued at 8,736*l.*; to which were added, the mansion, offices, timber, &c., valued at 1,200*l.*, all amounting, after deduction of certain burdens, to 21,655*l.* 10*s.* Mr. Stuart afterwards sent the titles and searches to Mr. Gordon, with a description of the lands as follows: "All and whole of the lands of Hillside, formerly called The Brewery of

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Newton, with houses, buildings, yards, orchards, &c., &c., and whole pertinents of the same whatsoever, together with the teinds included in the said lands of Hillside, all lying in the lordship of St. Colme, barony of Beith, and sheriffdom of Fife."

Relying upon Mr. Stuart's representations, valuation of Dr. Coventry, and the description of land so furnished, as well as on the search of incumbrances and titles exhibited, Mr. Gordon adopted the above description in preparing the bonds to his clients, believing it to be the proper description of the lands and estate of Hillside, and to comprehend the whole of these lands. The bonds so prepared by Mr. Gordon were executed by Mr. Stuart on 7th December 1823. Professor Walker and the creditors in the two other bonds, were duly infeft in the lands, in terms of the bonds, on the 1st January of 1824; their sasines were immediately thereafter recorded, and they continued respectively to receive the interest of the above loans from Mr. Stuart for four years. Mr. Stuart's affairs afterwards fell into embarrassment, and his estates were sequestrated under the Bankrupt Act, on the 1st of September 1828; Mr. Mansfield, the Respondent, was in due time elected trustee in the sequestration, and his election was confirmed by the Court on 6th October following, in common form. The Act of Confirmation contained the general and usual order upon Mr. Stuart, as the bankrupt, to grant all proper and necessary conveyances in favour of the Respondent, in order to vest him with the estate; and likewise a general decret, declaring the whole estates belonging to the bankrupt to belong to Respondent as trustee; but this decret did not confer any special right, or constitute feudal title in the Respondent.

The Respondent discovered, soon after, his appoint-

ment, that Professor Walker's security only comprehended a small part, not more than six acres of the lands which went under the general name of Hillside, and which consisted of various other parcels besides those described in the bond to Professor Walker, and were held under different titles. Professor Walker and the other heritable creditors having intimation of that discovery, took steps for completing their security, and obviating the Respondent's objection, before he as trustee had completed his feudal title in the lands. With that view application was made to Mr. Stuart, who had withdrawn to America after his bankruptcy, to grant corroborative or supplemental bonds in favour of Professor Walker and the other two lenders. Mr. Stuart agreed, and granted such bonds. The bond in favour of Professor Walker narrated the treaty between Mr. Stuart and Mr. Gordon, the agreement for a security over the whole lands and estate of Hillside, the furnishing of Dr. Coventry's valuation, as evidence of the extent and value of Hillside, the sending of the description of the lands by Mr. Stuart to Mr. Gordon, the subsequent transmission of the searches and titles, Mr. Stuart's approval of the bonds, as prepared by Mr. Gordon, containing the above description, and then set forth, "That although from the correspondence, &c. there can be no doubt that the true intent and meaning of the covenants entered into betwixt the parties who made the said loan, and me, was, that the security granted to each of them should extend over the whole of my lands and estate known by the name of Hillside, and to which the valuation by Dr. Coventry related; and that it was understood and agreed at the time, that the description of lands engrossed in the bonds, and transcribed from the

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titles exhibited, covered the whole of those lands; yet, as it has been alleged, &c., that the description in the said bonds does not comprehend the whole of the said lands and estate of Hillside, as contained in Dr. Coventry's valuation, and that the validity of the said securities is threatened to be disputed, &c. ; it is, therefore, just and reasonable that I should grant the cumulative and corroborative disposition in security underwritten, &c. Therefore, &c., in farther and more full and perfect implement to him the said Josiah Walker, of the covenant and obligation entered into by me, as the condition of the advance and payment acknowledged by the said bond and disposition in security, the deed then conveyed to Mr. Walker 'all and whole my lands and estate of Hillside, in the parish of Aberdour, and sheriffdom of Fife, in Scotland, extending to 95 acres of land, or thereby.'"

This corroborative bond was formally executed by Mr. Stuart, on 20th May 1829, and infetment in favour of Mr. Walker, was duly recorded on 13th July 1829. The Respondent had in the meantime, also taken steps for completing his title to the lands, as trustee in the sequestration, for on the 19th June 1829 he obtained a special disposition of the lands from Mr. Stuart, in implement of the prior order and decret of the court, and he was infet on that disposition on the 12th of August 1829.

In those circumstances, the Respondent brought his action against Professor Walker in January 1830, for the purpose of having the supplemental security reduced and set aside. Professor Walker died while the action was pending, and the Appellants, the trustees appointed by his will, were made defenders in his place.

The Lord Ordinary (Moncrief), on advising the cases,

and hearing parties thereon in February 1832, reported the cause to the Lords of the Second Division, with a note of his opinion (a).

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(a) The note was to this effect: "The summons in this case states two reasons of reduction, but it comprehends three grounds of law; first, that the disposition and sasine called for, constitute an undue preference, in violation of the statutes 1696, c. 5, and 54 Geo. 3, c. 137; second, that they amount to a fraudulent alienation, contrary to the Act 1621, c. 18; and, thirdly, that the disposition proceeded *a non habente potestatem*, in respect that it was granted after sequestration, and after the Act confirming the trustee.

The Lord Ordinary holds it to be proved, first, that there was a *bond fide* agreement concluded between Mr. Stuart and Mr. Gordon, as agent of Professor Walker, by which the sum of 6,000*l.* was to be given in loan by the latter, on the express condition of obtaining an adequate and complete heritable security; secondly, that that agreement was specific, to the effect that the security should extend over the whole lands comprehended in the report of valuation by Dr. Coventry, &c. It is impossible to raise a doubt as to Mr. Gordon's intention; for if he did not believe that he was getting a security over the whole lands in the valuation, he must be supposed to have wilfully taken what he saw to be no security at all, at the same time that he professed his determination not to lend except on complete and adequate real securities. Thirdly, it is admitted on the record, that the lands in the valuation are identically the same lands which are comprehended in the deed under reduction, with one unimportant exception: fourthly, this transaction was concluded, and the whole money *bond fide* advanced in December 1823, and bonds were then granted for carrying it into effect. The bankruptcy was in 1828. The bond to Professor Walker, in so far as it was insufficient for giving a security over the whole lands, was so made, contrary to the agreement, on the faith of which the money was advanced. Upon the admitted facts, it is clear that it was framed in this defective manner by the fault of Mr. Stuart, whether from fraud or from error. The Lord Ordinary sees no evidence of wilful fraud, and cannot presume it; but taking it to have been by error, it was still by the positive act of Mr. Stuart as the borrower, in misrepresenting the titles, and thereby misleading the party with whom he dealt. It is not the same case as if he had simply sent the title-deeds to Mr. Gordon to prepare the bond. With the misrepresentation the

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The Judges of the Second Division, on considering the cases, and hearing parties, appointed the cause to

error could not necessarily be discovered from the title-deeds; and the error was of so gross a nature, that, in this question, the act which produced it must be considered as *culpa lata quæ æquiparatur dolo*.

On the other hand, the deed under reduction was not executed till after the sequestration and the confirmation of the trustee. But the money having been advanced on the faith of obtaining a security over the specific lands contained in that deed five years before the bankruptcy, the Lord Ordinary has no doubt that if the same deed had been granted before the sequestration, but within 60 days preceding, it must have been considered not as a security for a prior-debt, but as implement of the previous specific obligation, and therefore within the exception of *norum debitum*, and not liable to reduction on the Act 1696. There is great difficulty in the question upon the third ground of reduction; viz. that the deed was executed by the voluntary act of the bankrupt after the sequestration and the confirmation of the trustee. When the point is stated in the abstract, there can be no doubt that no sequestrated bankrupt can effectually constitute a security over the estate by a voluntary deed. The estate becomes the property of the creditors, and there is an adjudication in the person of the trustee by the act of confirmation; and in this case the adjudication was special, the whole lands having been enumerated. But the case is not resolved by this general point. For, if the original contract be clear, and it be also clear that the first disposition was made imperfect by an error of Mr. Stuart, of a nature equivalent to fraud, the Court must determine whether it is competent to the creditors or their trustee to avail themselves of such an error. Mr. Stuart held the estate subject to a specific obligation to make the security good over the whole lands in the valuation. If the estate passed from him to his creditors, it could only pass as it stood in his person with that obligation; and, according to the judgment and opinions delivered in the case of *Gordon v. Cheyne*, the creditors could only take the right of the bankrupt *tantum et tale* as he held it. The adjudication in the person of the trustee did not divest the bankrupt feudally. An adjudication without charter and sasine has not this effect; and, certainly, assuming the existing obligation for a specific security, an adjudication by Professor Walker would have been competent after the trustee's

stand over for the opinions of the Judges of the other Division, and of the Outer House, when opinions were accordingly given. On again advising the case, with the opinions of the consulted Judges, the following interlocutor was pronounced, 11 July 1833: "The Lords, having resumed consideration of the cause, with the opinions of the Lords of the First Division, and permanent Lords Ordinary, sustain the title of the pursuer to insist in this action; find, that the defenders have not produced a title sufficient to exclude the action; reduce, decern, and declare in terms of the libel; find the defenders liable in expenses, and remit the account thereof, when lodged, to the auditor to tax and report." The appeal was from that interlocutor.

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Dr. *Lushington* and Mr. *A. Wood* argued the case on behalf of the Appellants, and Sir *John Campbell* and Mr. *Keay* for the Respondent.

confirmation; and, if first completed, would have excluded him. The point of difficulty is, that here the security was perfected by the voluntary act of the bankrupt; and it has been frequently decided, that even diligence, in itself competent, will be invalid to give a preference, if the creditor has only been enabled to obtain it by the collusive aid of the bankrupt. But, if there was a specific obligation to give the security, and if that obligation was binding on the creditors, the question is, Whether the pursuer has any legal interest to reduce it as granted by the bankrupt, whether the act of itself would, in other circumstances, have been warranted or not? The deeds are valid in point of form, Mr. Stuart not having been denuded. And if the thing done was an act of justice which the creditors might have been required to do, there can be no interest to reduce it, &c. The result, in the Lord Ordinary's opinion, is, that judgment for the defenders ought to follow from the equity of the statutes and the general principles of law under the cases of *Cormack, Gardner's Trustee v. Anderson (b)*, *Cranston v. Boutine (c)*, *Gordon v. Cheyne (d)*, and other similar cases.

(b) 7 S. & D. 868.

(c) 8 S. & D. 425.

(d) 2 S. & D. 675.

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Their respective arguments and the cases cited, are noticed in the judgment.

Lord *Brougham* :—My Lords, I shall take time to consider this case before I advise your Lordships to proceed to judgment. It involves a question of great importance in point of law, but I do not feel pressed by any great difficulty as to which way it should be decided. I strongly incline to an affirmance of the judgment of the Court below. I will state shortly the grounds on which I think it must be held, that Mr. Stuart had not the power to do that which forms the subject of this action. My argument proceeds chiefly upon the view of the subject which arises upon the Bankrupt Act, 54 Geo. 3, c. 137, and my opinion is, that the 29th section completely divests the bankrupt, although it does not invest the trustee completely, until his feudal title shall be made up. The bankrupt is prevented by the words of the Act from dealing with the property during the intermediate space, during which the trustee had not made up feudally his titles, but that did not enable the trustee to deal with the property, he being incapable of giving a feudal title according to feudal principles, until his investiture had been accomplished. A difficulty will arise if we are to determine this upon the statute of 1696, from the very imperfect knowledge we have of the way in which some of those cases referred to in the argument were looked at. With respect to *Houston v. Stewarts* (e), we have a current of opinions on the subject. The late Lord Meadowbank, without many exceptions the most diligent and attentive lawyer I ever remember in the practice of the Scotch law, gives an opinion of the most unhesitating nature against the authority of that case.

(e) Morr. 1170.

There is a circumstance which I cannot leave out of my view, and that is the great hardship of Mr. Walker's case; and if I should ultimately be of opinion that I ought to advise your Lordships to affirm the decision of the Court below, as is very probable, I hope that I shall find that we may affirm it on the principal matter, without affirming that which saddled him with expenses. This case is a very hard one, and it is not the less hard for this, that there is no blame attachable to the party with whom he was dealing. This is perfectly reconcilable with the circumstances of the case, without imputing intentional blame to him; but Mr. Walker has been the sufferer all the same as if it had been intentional neglect, and his representatives are therefore very much to be pitied; at the same time the trustees for the creditors are not bound to give up their rights. It might have been an argument to have been addressed to him if he had been living and solvent; but the creditors stand in another situation. It becomes, therefore, advisable that, if possible, they should not be required to pay the expenses. It appears to me very extraordinary why the learned Judges in the Court below should not have thought of this further matter when they came to consider the giving of costs below. The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but you can bring an appeal on the merits; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the Court called upon to review the case, the Court of Review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the Court below, consider the question of costs as if it is fairly raised. That ques-

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tion is open to the Appellant, provided the other was not a colourable object of the appeal, and no human being can think here, that that was a colourable object; the individual who had been really injured, was entitled fairly to bring his case before the court; I shall, therefore, if I recommend to your Lordships to affirm the judgment, certainly take that matter into my consideration (e).

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Lord *Brougham*:—My Lords, the facts of this case are undisputed. Mr. Stuart gave Professor Walker, in 1823, a security over a parcel of his real estate of Hillside, in the county of Fife, and believed, as did the Professor and his conveyancers, that this security extended over the whole property of 95 acres of very valuable land. In this belief the sum of 6,000 £. was advanced, and the lender was infest in 1824. It was afterwards discovered that the title given extended over only five or six acres, and Mr. Stuart then gave an additional security conveying the whole, but this was after he had become bankrupt, a sequestration having been awarded in September 1828, and the Respondent having been chosen and duly confirmed trustee for the creditors on the 6th October of the same year, while the corroborative security was not granted until 1829. Between the Respondent's confirmation as trustee, and his making up his title as such, Professor Walker was infest upon the second security, and this action was brought by the trustee to reduce that second security, and all that followed upon it. The Court decreed for the reduction, and I am of opinion that the decree is well founded, and must be affirmed. There are two grounds on which

(e) See *Huband v. Huband*, 7 Bro. P. Cases, p. 436; *Fitzgibbon v. Scanlon*, 1 Dow. 270; *Tod v. Tod*, 1 Bligh, N. S. 645; and *Burket v. Spray*, 1 Russ. & Nyl. 115.

it rests: first, that the security granted was reducible under the Act 1696, as granted within the period when all preferences of the bankrupt are reducible; and secondly, that, whether it is so reducible or not, yet being granted after the adjudication of bankruptcy, and the confirmation of trustee, it was granted *a non habente potestatem*, and is a nullity as against the trustee in whom the estates real and personal of the bankrupt were vested.

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With respect to the first point there is a conflict of authorities, and it becomes unnecessary to decide on which side the balance must be cast, as the second ground is sufficient for our purpose; yet the great importance of the question carries me into this discussion. That infetment within the sixty days may be validly taken upon a conveyance made prior to that period seems not to be denied. It is agreed that an heritable right may be granted before the sixty days, and seisin may be validly taken upon it within that time, although nothing of the prior right can appear on the record. But the security itself having been here granted after the statutory period, and not merely the sasine had, we need not dwell longer on that admission, and there is certainly no small discrepancy in the authorities upon this point. Previous to the case of *Mansfield v. Cairns* in 1771 (*f*), the decisions were against the validity of a security so granted; but it was then held that money having been advanced before the time, on an agreement to grant heritable security for the loan, such security might safely be granted within the sixty days, and the same doctrine was upheld in the subsequent case of *Houston v. Stewarts*. As the provisions of the Act 1696 strike at preferences, these decisions could only stand upon the

(*f*) 5 Bro. supp. 386.

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ground that there was in such cases no preference. The Act expressly names, "All dispositions, assignments and other deeds granted in favour of his creditors, either for his satisfaction or further security, in preference to a creditor;" and I confess my own inability to discover how the party advancing the money, for example, in *Mansfield v. Cairns*, which never had been paid, could be considered as other than a creditor of the bankrupt, merely because he advanced it upon an agreement, and how the heritable security afterwards granted in performance of such agreement could be deemed anything but a further security. However, these two decrees plainly view the parties as standing in a different position, and the transactions as differing, so that, unable to perceive the grounds of the rule there laid down, and thinking the causes wrongly decided, I am not surprised to find them afterwards questioned by the Court. In *Spottiswoode v. Robertson Barclay*(g), on 19th November 1783, the point was raised by an heritable security granted in pursuance of an obligation in a marriage settlement, and the security sustained; but Mr. Bell says, in the second volume of his Bankrupt Law, and I here quote him, not as an authority, but as the reporter of the case, that the Lord Justice Clerk Braxfield and Lord President Campbell (two of the great authorities in the Scotch law) doubted the soundness of the first decision, when a reclaiming petition was presented, and a hearing in presence ordered, which never took place, as the case was compromised; and Mr. Bell adds, that there is reason to believe the first decision would have been reversed. Now, surely, if a bankrupt is not allowed validly to perform what he has bound himself to do by marriage-contract, it is strong

(g) Morr. 1177.

to say that he can validly implement any other onerous obligation within the statutory period. It is recorded of Lord Monboddo, that he said, on the decision in *Mansfield v. Cairns* being pronounced, "There is no use in studying law."

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In the subsequent case of *Maclean v. Primrose*(*h*), the late Lord Meadowbank, a very high authority, held *Houston v. Stewarts* not to be law, and in one of the cases of *Brough v. Duncan*(*i*), and *Trustees of Brough v. Spankie*(*k*), both decided in June 1793, the Court held the same opinion upon that case of *Houston v. Stewarts*, regretting that the older one of *Eccles v. Merchieston*, prior to 1731, had been departed from; and although they said nothing of the first of these cases, which made the deviation (*Mansfield v. Cairns*), it is plain that this cannot stand, if *Houston v. Stewarts* be overruled. In the one of these cases, of *The Trustee of Brough* (the second), the Court held the statute to apply to securities given after the commencement of the sixty days, in implement of preceding obligations. There had been a holograph letter, on the faith of which a bill had been accepted, and agreeing to give the acceptor heritable security over a particular property, as soon as the writings could be made out. The security was not granted till within sixty days of bankruptcy. This was held to be struck at by the Act 1696, and it was in this case that the Court pronounced *Houston v. Stewarts* to be wrong. I am glad to find that an observation I made at the close of the argument, that I could not see how the cases of *Brough v. Spankie*, but only to *Brough v. Duncan*. *Brough v. Spankie* is a perfectly good decision, according to the old law. The other case appears to me to have

(*h*) 2 Bell, 225, n. 2.      (*i*) Morr. 1160.      (*k*) Morr. 1179.

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been itself erroneously decided, at least, if the decision is held to strike at an infestment taken within the sixty days, on a security granted before, which was the case. It is barely possible to consider that the long time which has been suffered to elapse between the date of the conveyance and the completing of the security by infestment, which was above three years and a half, may have been a sufficient ground for the decision, as evidencing a fraudulent and collusive transaction; certain it is that this case can stand on no other ground: but with the other case, of *Trustee of Brough v. Spankie*, I have no quarrel at all; and thus the law would have stood clear, and ultimately consistent with the older and sounder doctrine of *Eccles v. Merchiston*, which had been temporarily departed from in *Mansfield v. Cairns* and *Houston v. Stewarts*.

But, unfortunately, there occurred a case in 1811, *The Bank of Scotland v. Steuart* (1), in which the Court once more recurred to the exploded doctrine of these two ill decided cases; and excepting the fact of the title-deeds of the borrower having actually been deposited before the statutory period, for the purpose of making out the conveyance, I can find nothing to differ that from the cases of *Eccles v. Merchiston* and *Brough v. Spankie*, or to justify a recurrence to the contrary doctrine.

Upon the whole, I am of opinion that the law of *Eccles v. Merchiston* and *Brough v. Spankie* are rightly decided; that one of the Brough cases, *Brough v. Duncan*, is not to be supported; that *Mansfield v. Cairns* and *Houston v. Stewarts* are not to be considered as law; and that though a party taking infestment after the statutory period has begun, on a security fully given before, is safe, yet that a bankrupt giving security after the period, in virtue of an obligation previously

(1) *Fac. Coll.* Feb. 7, 1811.

given for a valuable consideration, whether of marriage, or loan, or purchase, is within the Act of 1696.

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But the second point in the cause appears to me encumbered with no doubt, and it is in my judgment quite decisive in favour of the decree under appeal. Mr. Stuart was at the time in question under the operation of the Bankrupt Act, an Act expressly framed for making the payment of debts more equal, and for distributing all an insolvent person's estate, of whatever kind, equally among all his creditors. Now, although the retrospective operation given to the bankruptcy by the Act of 1696, may not extend to prevent a person not yet bankrupt from doing certain acts which he had previously actually bound himself to do, and which acts are, the giving of preferences to old creditors; and although certainly that retrospect is to be construed strictly, and not permitted to extend beyond what is fully expressed in the statutory words of nullity; yet it by no means follows that he is, after having been adjudged a bankrupt, empowered to do any act whatever, either original or supplementary,—either acts which he lay under no previous obligation to do, or acts to do which he had already bound himself; while he continues to have an independent and legal existence, he may be allowed to perform his obligations, although within the period during which he is by the Act enabled to give new securities, he may be enabled validly to do any act which falls not within the statutory description of preference to one creditor over the rest. But it by no means follows that after his legal existence, as owner of any property, has altogether ceased, he shall have any power whatever, either to grant new securities for old debts, or to give one creditor any other preference over the rest, or to do

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any act affecting his property, even though that act should be of a kind which confessedly does not fall within the retrospective operation of the statute of 1696 : and indeed, without regard to the specific provisions either of that or of the later Bankrupt Acts, we may say generally, that a more strange anomaly could not well be imagined, nor any position more entirely at variance with the whole policy of the bankrupt law, and indeed more repugnant to the notion of an adjudged bankrupt, than that he should retain the power of conveying his property after he had been so adjudged by sentence of the Court, not *ex parte*, as in England, where the adjudication takes place without his knowledge, but *in foro contentioso* in a suit to which he was cited as a party. To support so singular a doctrine would require the plainest statutory enactments, and these are here all signally the other way.

First, we may observe upon the nature of the process of sequestration itself. The action of declarator of bankruptcy, given by the Act of 1696, and in lieu of which the sequestration given by the 12 Geo. 3, c. 72, extended to real estates by 23 Geo. 3, c. 18, was substituted, affected all the property of the bankrupt in the same manner in which the late Acts do ; for by that Act of 1696, upon a person being adjudged bankrupt in the declarator, his acts and deeds after his bankruptcy, as well as within sixty days before it, are declared void, if done in preference of one creditor over another. This, however, bringing the question back to that which was discussed under the first head, I need dwell no longer upon it, as, in dealing with the present part, I rely on the provisions of the later statutes. I may only observe, that the earlier statutes, 12 and 23 Geo. 3, are not so express in their words vesting the trustees, and consequently divesting the

bankrupt, as the more recent statutes; but they assume the nature and force of sequestration to be, as no doubt it is in itself, a judicial divestment, which makes the bankrupt's power of dealing with his property cease, unless in so far as he is to obey the orders of the Court in making the conveyance to the trustees. In particular, all these Acts, old and new, contain a provision, declaring all the bankrupt's property, real and personal, at the date of the sequestration, to be a fund for distribution among his creditors; this forms the 38th section of the present Bankrupt Act, and it is the 22d section of the 23 Geo. 3, c. 18, the first Act that applied sequestration to heritable estates. In truth, the process of sequestration can mean nothing else.

Let us now see what additions are made to these things by the law at present in force to regulate the whole proceedings in bankruptcy, the 54 Geo. 3, c. 137. The trustee in this case had been confirmed as such by a decree of the Court, and we are to see how the Act treats the rights of a person so acknowledged, and how, by necessary consequence, it treats the bankrupt himself. The 29th section requires the Court to ordain (that is, to command by a judgment or order) the bankrupt to make over, within a time to be specified, by disposition or other proper deed of conveyance, to the trustee his whole estate, real and personal, specially describing the parcels in such conveyances, and the instrument is required in such form and style as may effectually vest the right in the trustee. Now suppose it had stopped here, and the Court had made the order which it has made, as much reliance is placed by the Appellant at least upon the first branch of the argument upon the analogies of our English law touching equitable estates, let us ask how our Courts would consider any act done by a bankrupt, or by any person after an order had been made upon

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him to convey his estate to *A. B.* for whatever purpose? Why it is clear that he never could validly affect that estate by any act whatever, except by the conveyance which he was directed to make. It would not follow that *A. B.* could, before the conveyance, deal with it; but at all events the bankrupt, or other person ordered to convey, never could deal with it effectually in any manner of way. But the statute proceeds to declare and enact that in all circumstances, and whether such deed be executed or not, "the said whole estate and effects shall be deemed and held to be vested in the said trustee for the creditors." Is not this enough to divest the bankrupt? Is it not a statutory conveyance at all events out of him? Is there a better title to the substance of any right, whatever may be wanting to the forms of executing it, than an Act of Parliament, providing expressly that such right is, by force of the Act, in one party? But at any rate, can a man's property be taken out of him more effectually than by a law of the country providing that it is thereby vested in another? Can a man's lands be more effectually tied up than by a statutory declaration and enactment? What stronger case would it have been had the Act expressly said (which would have been really superfluous) that the bankrupt should thereafter cease to do any act relating to his property so divested? But the Act goes on, and in the plainest terms assumes his being divested by the statute, and by the order which the Court is required to make; for it directs the Court to declare, decree and adjudge in its order, that the whole estate, right, title and interest which were formerly in the bankrupt, shall now pertain and belong absolutely and irredeemably to the trustee. This adjudication has in the present case been made, and, in my clear opinion, divests the bankrupt; although, until

the trustee makes up his title, he cannot convey by sale or incumbrance, upon plain feudal principles, still it is enough to take the property out of the bankrupt. But I read the words of the Act now, for the further and important purpose of showing that the Legislature so regarded the order of adjudication; for the Act speaks of "all the right, title and interest formerly in the bankrupt." Words cannot more clearly express that after the adjudication the estate is not in the bankrupt at all, and that all his power over it in any way, and to all intents and purposes, has ceased from and after that period. The authority of the case of *Mitchell v. Ferguson*(*m*) has been cited in further support of the decree, and it bears upon this branch of the argument; for the Court there held an adjudication of a real estate, subsequent to a disposition on which no infeftment had been taken, sufficient to cut down that disposition, and defeat a sasine subsequent to the adjudication, and before infeftment on the adjudication. There the sasine of the assignee under the disposition, according to my recollection, was interposed between the adjudication and the infeftment upon the adjudication.

As for the argument raised upon the analogy of inhibition, and on the 22d section, which gives the recorded petition the force of a recorded inhibition, nothing can result from that; the object of the provision is to make the mere intimation of the petition of sequestration and the first deliverance upon it, if registered, have a certain effect; and it gives that proceeding only the effect of inhibition, deeming this a sufficient protection against acts to be done while the petition is pending, and before adjudication. Nothing can be more rational than the supposition that the Act intended to give the inchoate procedure, the

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(*m*) Morr. 10296.

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mere presenting and intimating a petition to sequester, a less extensive nullifying effect than the final adjudication itself. Nothing can be more consistent than that the sequestration itself finally granted should divest the bankrupt to all intents and purposes, while the commencement of a proceeding to obtain that sequestration should only have the more limited effect of a recorded inhibition.

Much of the argument in this case seems to have been rested on the analogy of our equitable estates in England; but the Scotch law now holds no resemblance to the law of England in this particular, though both systems had one common origin. Our equitable titles are peculiar to our jurisprudence; an agreement to convey an estate for a valuable consideration executed, is, to all substantial purposes, a conveyance which vests the property in the purchaser; although, to obtain his full rights, he must resort to one Court, and demean himself as a suitor, according to one set of rules, and not another; whatever is covenanted to be done, is held in equity as done; so that a title by mere agreement is quite as paramount to any subsequent incumbrance or other previous title as a legal conveyance. This is not the law of Scotland upon feudal principles; the party who first perfects his title by sasine (and since the Act of 1617 by registration also of his sasine) is preferred to him who, at a prior time, may have paid his money on an agreement or obligation. Land is only affected by the Scotch feudal law in a certain way; any other mode of transferring it or burthening it is as inept and as inefficient as a sale or mortgage by parol would be with us. If, in this country, a man gave his money on a parol conveyance or mortgage, he would, of course, be cut out by one who the next month got a mortgage or conveyance, or even an equitable title by a written

agreement from the same proprietor to the same lands. This might be a hardship, and it is exactly the same kind of hardship which may happen in Scotland, and which has happened here, with this very difference, that in Scotland writing may be as inefficient to affect the land, as parol is with us.

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This consideration too is an answer to the argument that the trustee takes the estate of the bankrupt *tantum et tale*;—I refer to this, for this is the ground of the opinion, with which I totally differ, of one of the most learned of the Scotch Judges, for whose opinion I have a constant and habitual respect, I mean Lord Moncrief;—he does take it *tantum et tale*, and the estate was not affected in the bankrupt's hands by the personal obligations, which were sufficient only and valid and binding against the bankrupt personally. He takes the estate *tantum et tale*, and what does that mean? *Tantum et tale*, of such kind as it was in the hands of the bankrupt. What was that? *Quantum et quale* as it was in the bankrupt. On the clearest principles of feudal law, it was not effectual or valid merely by his conveyance; that would not affect their legal estate any more than a parol conveyance in this country would convey the real estate. Between the bankrupt and the trustee there can be no privity, such as to affect the latter with any personal obligation incurred by the former, and the land not being affected by such obligation, the trustee takes it *tantum et tale*; takes it discharged from any real burthen. As to the English law, it may be further observed, that we allow some further nicety, oftentimes working great injustice to creditors. He who *posteriori tempore* obtains a legal title to an estate covered with real securities, will, by obtaining a prior equity, defeat one.

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who lent his money on an equitable title only, between the date of the two titles that now unite in one person. So that one who has lent his money this year, may be defeated, or, as it is very expressly termed, squeezed out by one who has only advanced money on the same estate a year after, but who has not concluded his equitable with his legal title.

The rigorous administration of the feudal principles of law in Scotland can work no further hardship than this, and the consideration of such topics is only important in such cases as affecting the question of costs. I am of opinion, on account of the hardship of this case, that none should be given in this House, and that none ought to have been given in the Court below. So far I shall advise your Lordships to alter the interlocutor, as costs were given in the Court below, and with that exception, for these reasons, I shall advise your Lordships to adhere to the interlocutor. I have gone with some particularity into the case, on account of the great importance of it, and particularly the discrepancy of the authorities which at first appeared to exist. I have given to them, as I stated I should, a very careful consideration, as well as to the opinions of the learned Judges in the Court below, and I have stated my opinion at some length, in order that the parties may know exactly the grounds on which the House have come to the decision. I now move your Lordships that the interlocutor be affirmed, without costs, except in respect of costs, and that that part of the interlocutor be reversed.

It was accordingly ordered and adjudged by the Lords, &c., that the interlocutor complained of, so far as the same "finds the defender liable in expenses, and

remits the amount thereof, when lodged, to the auditor to tax and report," be and the same is hereby reversed; and it is further ordered, that the said interlocutor, in all other respects, be and the same is hereby affirmed.

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## A P P E A L

FROM THE COURT OF SESSION.

May 7.

DONALD M'AULAY - - - - - *Appellant.*

JAMES ADAM and DAVID BROWN - - *Respondents.*

A client having required his attorney's bills of costs to be taxed, the attorney intimated to him that in that case he would make out new accounts, in which he would charge his full legal fees, which were not charged to that extent in the bills delivered, and accordingly he employed a person to remodel the accounts, and that person inserted in the new accounts fictitious charges, and increased other charges which were in the former accounts. The attorney denied all knowledge of the insertion of the fictitious charges, and abandoned them before the auditor to whom the accounts were by order of Court remitted to be taxed. The Court by a subsequent order instructed the auditor to report specially on the different subjects and points raised by the client's answers, imputing to the attorney a participation in the fabrication of the fictitious charges. These charges having been abandoned, the auditor made no inquiry into them, but reported on the other costs, taxing off about one-fourth of the whole bill, and no objection being lodged to that report when it came before the Court, it was confirmed with costs. HELD, that it was not competent for the client to appeal to the House of Lords against the order confirming the report, as he had not lodged objections in writing to it in the Court below.

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An appeal for mere costs does not lie, yet if an appeal is brought on a substantial question, not colourable, the House may deal with the costs awarded by the Court below (a). Accordingly, in an appeal which appeared to the House to have been brought for costs, but in which the order appealed from was varied materially, in favour of the Appellant, by the correction of an error, which, however, he might have prevented by a mere suggestion to the Court below, it was HELD that the Appellant is not, on the ground of that variation, entitled to be absolved from costs; but, under the circumstances, the appeal was dismissed without costs.

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THE Appellant is a surgeon in the Island of Lewis, (Scotland) and the Respondents are Writers to the Signet in Edinburgh. The Respondent Adam acted for several years as agent for Donald M'Aulay, sen., deceased, and for his son, the Appellant, in various lawsuits in which they were concerned. In the year 1828 Adam entered into partnership with the Respondent Brown, and during three years that the partnership subsisted, the law business of Messrs. M'Aulay was conducted by Messrs. Adam & Brown. A state of accounts between them and the Appellant, as at March 1830, was rendered to him, by which it appeared that, after giving credit for the sums paid on account, there was a balance then due to Messrs. Adam & Brown of 464*l.* 17*s.* 5*d.*, exclusive of an account of expenses previously incurred to Mr. Adam, and due to him individually. That account was furnished with a view to an amicable adjustment. The Appellant, having been afterwards pressed for a settlement, desired that the accounts should be submitted to the auditor of Court for taxation, and the Respondents agreed to that proposal; but as they alleged that the accounts were stated at a lower rate than

(a) See the last preceding case, pp. 371 & 372.

they were entitled to have charged, they reserved to themselves the power of stating the charges at the full amount which they were entitled to demand. The accounts were accordingly referred to a Mr. Robertson, to remodel them for the auditor, and a copy of them, as remodelled, was sent to the Appellant.

The partnership between the Respondents being dissolved in July 1831, Brown, who was empowered to collect the outstanding debts due to the firm, wrote several letters to the Appellant, asking for a settlement, without effect. In the month of November of that year the Appellant, having come to Edinburgh with a parcel of cattle for sale at Hallow-fair, the Respondents raised an ordinary action against him, and thereupon attached his cattle; but upon his giving two bills of 200*l.* each (one of which has been since paid), his cattle were liberated, the action was abandoned, and the Appellant then gave consent in writing that the accounts between the Respondents and him should be audited under the authority of the Court of Session.

The Respondents, consequently, presented a petition to the Court on the 17th of November 1831, conformably to the Act of *Sederunt* of February 6th, 1806 (*a*), and they produced therewith copies of their

(*a*) One of the enactments of that Act is as follows:—"In order to provide an easy method by which the accounts of practitioners, as between agent and client, in this Court, may be checked and liquidated, the Lords do farther ordain, that it shall be competent, either to the client or to the agent, to make a summary application to the Court or to the Lord Ordinary before whom the cause may depend, or has formerly depended, to get the account claimed by the agent remitted to the auditor of Court, in order to be examined and taxed according to these regulations; which remit shall, on the application having been served on the opposite party, and produced in Court with a written intimation, be forthwith granted; and the auditor shall thereafter inquire and report upon

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remodelled accounts, one amounting to 381 *l.* 10*s.* 11½*d.* for expenses incurred for the joint behoof of the Appellant and his deceased father, a second amounting to 524 *l.* 10*s.* 11½*d.* for expenses incurred on behoof of the Appellant only, from which latter was to be deducted 304 *l.* 13*s.* 8*d.*, in respect of payments on account. The petition prayed the accounts to be remitted to the auditor of the Court to tax the same, &c. On the next day the Court granted warrant of service of the petition on the Appellant, and he was ordered to lodge answers thereto within eight days. On the 15th of December 1831 the following interlocutor, which is the first of those appealed from, was pronounced: "The Lords having heard this petition, and counsel for the parties, remit the petitioners' accounts to the auditor of the Court to tax and to report, and the parties or their agents to attend for taxing on or after the first sederunt day in January next."

the said account to the Court or the Lord Ordinary; and the party shall have it in their power to state objections to the report, all in manner abovementioned; and the sum so to be ascertained as the amount of the account shall alone form a charge against the client," &c. "And in case either party means to object to the report of the auditor, he shall immediately lodge with the clerk a note of his objections, stating them shortly, and without entering into argument; a copy of which note shall be transmitted by him to the agent on the other side; and the Court or the Lord Ordinary may either direct the same to be answered in writing, or *vide vox* at the bar, as the case may require, the expense of such discussion being always laid upon the objector, in case his objections shall not be sustained; and the interlocutor to be pronounced shall be final."

By another Act of Sederunt it is provided, "That when in any cause a report has been obtained from an accountant or other professional person, and the parties, or either of them, shall be dissatisfied with the report, the cause shall be enrolled before the Lord Ordinary for debate on the report, and a note of the objection shall be furnished to the opposite party 48 hours before the enrolment."

The Appellant afterwards obtained an enlargement of the time to lodge his answers to the petition, and in the mean time some meetings took place between his agent in Edinburgh, Mr. Roy, and the Respondent, Brown, to whom Mr. Roy pointed out many new and fictitious charges in the remodelled accounts, which were not in the accounts first rendered to the Appellant, whereupon Mr. Brown declared that he had never seen the accounts as remodelled; that he was wholly ignorant of such improper charges having been introduced, and disapproved of them, and he agreed not only to strike them off, but also to withdraw other charges which were likewise considered objectionable. A correspondence took place between Mr. Roy and the Respondent, Brown, as to other charges in the accounts, upon which they could not come to any arrangement.

The Appellant ultimately gave in his answers, in which he admitted his liability for a business account to the Respondents, but he denied that he owed all the sums charged in the accounts, founded on in the petition; and he alleged that Mr. Robertson, to whom the first accounts were referred to be remodelled, "proceeded to concoct and fabricate a new account, as large as he could make it, by inventing and inserting additional fictitious charges, and altering, remodelling and constructing documents to correspond to these. The result of the whole was the accounts now founded on in the petition, which contain charges innumerable, not in the original accounts, not actually incurred, and the mere fruit of invention. Fees are stated as paid to counsel, which never were paid; consultations are charged for, which never took place. There are borrowings and revisings and meetings set down, not one of which ever happened. There are

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memorials to counsel, and copies of papers charged, none of which ever were drawn at the time, and which, if they exist at all, were drawn *ex post facto* by this Mr. Robertson, to bear out the false charges before the auditor. To the extent of about 300 *l.* the accounts now charged to the Respondents (including those of the firm, and of Mr. Adam individually), are a mere fiction."

In illustration of these general allegations, the Appellant referred to particular charges in the accounts, and admitted that the Respondents offered to deduct a great part of them (to the amount of 180 *l.*), but he said that the offer was made for the purpose of stifling inquiry, and he asked for a commission and diligence to the auditor to examine witnesses in support of these imputations on the Respondents.

These charges and imputations on the conduct of the Respondents appearing to the Court to require investigation, the following interlocutor was pronounced on the 8th of March 1832:—"The Lords, having resumed consideration of this petition, with the answers thereto, and heard counsel for the parties, appoint them to be heard before the auditor; grant commission to him for this purpose, and instruct him to report specially on the different subjects and points in question to the Court therein; and grant commission and diligence to the parties for citing witnesses and havers in common form."

When the parties were before the auditor, the Respondents requested that, instead of the accounts produced along with the petition, a new set of accounts, which had been subsequently produced by them in process, should be taxed, in which all the fictitious charges introduced by Robertson had been omitted (and which had been previously given up),

alleging, that by this course all the trouble, delay, and expense attending the commission and diligence would be saved, and that it was useless to go into an investigation concerning charges which had been abandoned, or to prove the facts regarding the remodelling of the accounts, which they had fully admitted. The Appellant objected to any accounts being taxed, except those originally produced along with the petition, unless the petitioners (the Respondents) agreed to pay all the expenses hitherto incurred; that proposal not being agreed to, the auditor proceeded to examine the accounts produced with the petition, and he taxed off 219 *l.* 2 *s.* 3  $\frac{1}{2}$  *d.*, from a sum of 889 *l.* 7 *s.* 6  $\frac{1}{2}$  *d.*, which sum was composed of the two accounts before-mentioned, and he reported accordingly for 670 *l.* 5 *s.* 3 *d.* due to the Respondents.

The following interdictor was pronounced on 15th of February 1834: "The Lords having resumed consideration, &c., approve of the auditor's report upon the accounts libelled, and in terms thereof, decern against the Respondent (the Appellant) in favour of the Petitioners (the Respondents) for the sum of 670 *l.* 5 *s.* 3 *d.*, reported upon as due, under deduction of 304 *l.* 13 *s.* 8 *d.* paid to account, as stated in the petition, together with the legal interest on the balance, from the 17th day of November 1831, and till paid. Find expenses due to the Petitioners, including the expenses of this discussion, and of the procedure before the auditor. Allow accounts thereof to be given in, and remit the same, when lodged to the auditor to tax and report."

Two accounts of these expenses were afterwards taxed and reported; one for 134 *l.* 6 *s.* 11 *d.*, in name of Adam & Brown jointly; the other for 27 *l.* 11 *s.* 7 *d.*

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in name of Adam only; and the Court, by two interlocutors dated the 7th of March 1834, approved of that report, and decerned accordingly.

The appeal was against the three last interlocutors, and against that of the 15th of December 1831, before stated.

Dr. *Lushington* and Mr. *Tinney* for the Appellant:—

The report of the auditor ought not to have been approved of, as being directly at variance both with the order of the Court and the auditor's duty under that order. The Court ought not to have decerned against the Appellant for the sum contained in the judgment, but ought to have given credit for the partial payment of 200 l., and ought also to have given effect to all counter claims, which, either in name of costs or otherwise, the Appellant had against the Respondents, in connexion with the matters before the Court.

The Court ought not to have decerned the Appellant to pay the Respondents their costs, as if they had successfully maintained their judicial demand against an unjust defence. On the contrary, the Court ought to have remitted the case again to the auditor, with instructions to perform the duty which had been specially enjoined on him, or ought to have taken other steps, either by ordering a record to be made up, or otherwise, to have the merits of the case brought fairly before them. There was sufficient evidence before the Court, and within its reach, to have warranted them in finding that the demand made by the Respondents was an unjust demand, and that the Appellant had been fully justified in his whole steps of resistance to it.

Before awarding to the Respondents any sum which might be justly due on their business accounts, the Court ought to have found the Appellant entitled to the expenses to which he had been unjustly subjected in the matter of these accounts, and on ascertaining the amount of these expenses, to have sanctioned that amount as a deduction from the Respondents' accounts. As the result of this would have been to leave no balance due to the Respondents, the petition ought to have been entirely dismissed, in place of the Respondents having had given to them what they at present possess, the decree of a Court of law for the amount of an unjust claim, coupled with what is equivalent to the expression of actual censure on the Appellant, for having fairly and honestly resisted it.

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Mr. *Pemberton* and Mr. *M'Neil* for the Respondents, were stopped (*b*).

Lord *Brougham* :—I shall first state to your Lordships the grounds upon which I come to the opinion that, although your Lordships might be disposed to regret one or two matters admitted in the Court below, you are now precluded from entering into the consideration of them ; and I shall then proceed to state the grounds upon which, as I think, the judgment of the Court below must stand, with a slight variation as regards the sum of 200 *l.* paid by the Appellant. The question arose in those circumstances.—[His Lordship stated the facts, and then proceeded.]—In consequence of the objection naturally enough taken by the Appellant to the state of the account, as being confessedly most obscure and unintelligible, even to professional men, Messrs.

(*b*) *Vide infra*, p. 411.

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Adam & Brown employed a person to remodel and arrange it, and make it more easy to be understood and consequently more fair towards the parties who were chargeable. That this was a very fit course to take, no person can deny; but then it was fit only thus far forth, that the person—the accountant,—to whom it was sent to be what was called *remodelled*, or rather classified and arranged, should confine himself to such process of classifying and arranging, so as to make that easy of comprehension which before was hardly comprehensible at all. It is one security to a party who runs up a bill with any man employed by him, whether as a tradesman or a professional agent, and who allows that account to run on from year to year, and to combine a great variety of items, that the books of the person charging him for those items—that the accounts kept regularly and from day to day of the business done by the professional person, or of the goods supplied by the tradesman,—should, in the first instance, speak for him and for themselves, and tell a tale against the customer or against the client, with the kind of authenticity, and therefore proportionate degree of credit derived from contemporary entries in books of account. Consequently, whoever makes out a bill against a client or against a customer, ought, as near as may be, to follow the entries in the order of time, and in the specification of the items in the account. If a confused statement is made in the first instance, and if the account-books will not help those persons, so charging and so making out the confused statement, to clear it up, then it becomes a very delicate matter indeed to do anything but merely new arrange, with explanations, the entries in those books; but it is by no means a proceeding to be countenanced in any court of justice, or by any man of business, with any kind of approbation, that anything further

should be done, in the way of making the account clearer, than simply explaining, apportioning, classifying, and as it were, altering the arrangement of the items. If you go beyond that, you take away the credit and the kind of authenticity derived from such books or sheets of paper, if kept in separate memoranda, and you take away, by so much, the kind of security that the client or the customer derives from that source. I therefore cannot approve of anything called *remodelling*, unless it is confined, as I have described the process, to arrangement and explanation.

After the Appellant had taken the objection, and Messrs. Adam & Brown had so far yielded to it as to say that the account should be referred to a person to remodel it, they appointed one James Robertson to that office, and from his proceedings in discharge of that duty has mainly arisen this litigation. At the time the objection was taken to the account, Messrs. Adam & Brown said to the Appellant, or they gave him to understand, that they had charged him less than the amount they were strictly entitled to; and if it was made a matter of contentious discussion, they then might raise the charge to the usual level,—accordingly, when they appointed Mr. Robertson to perform the operation of remodelling, they desired him to take that into consideration, and see if anything could be added.

Now, I by no means intend to assert that a person who has made one charge against his debtor, and limited himself to that amount, may not honestly and correctly enough, if that charge is refused to be paid, and the justice of it disputed, say, “If you dispute it, I will charge what I have a right to do; I have not gone to the extent of my right, but I will go to the

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extent of it if you defend yourself upon your right." Nevertheless, that is not the ordinary, or indeed a creditable mode of proceeding. Is it fair, because a party refuses payment of an account delivered, to say, "All I have done hitherto means nothing; all I have given you in as my demand shall go for nothing; I will ask you a great deal more?" It is not a common mode of proceeding, and if the first bill came before a jury in the course of a contest, I do not think there is any reason which could suffice to convince the jury that the first was not the proper amount of charge; unless, from circumstances which I can hardly figure to myself, the person had been kept from going in the first instance to the full extent of his claim. However, it is clear that the solicitors here did give notice to their client, for they said, "We shall charge you to the full extent, if you dispute the account." Accordingly, Mr. Robertson, so authorized, proceeded with the office of remodelling; and, in looking out for charges, he obeyed the instructions even more than to the letter, for the success that attended his exertions was such, as appeared from one expression in the correspondence, as to have surprised his employers. He raised the demand against Mr. M'Aulay, about 160*l.* for business done since the account was rendered, and he raised it by 300*l.* upon the whole for business not brought in before, making the account between 900*l.* and 1,000*l.*, which had been between 400*l.* and 500*l.* Part of that was for business newly done, and an offer was made by the Respondents to depart from another part of it.

It is material to observe that the first application made to the Court by the Respondents here—the petitioners below,—was in the usual way, to have their bill taxed; to have the account of the expenses

against their client remitted to the auditor of the Court; and it is material, for the course that the case has taken, to attend to the first part of the proceeding; which is the point from which the whole litigation sprung. The bill was presented, and served by the order of the Court, in November 1831, upon the other party in the usual form; that was then the ground of the next order, being the first interlocutor appealed from, which is in the usual form, to remit the petitioner's account, annexed to his petition, to the auditor of the Court, and the parties to attend the taxing upon that order. There had been an attendance upon the auditor; a report had been made by him, and that report had found Mr. M'Aulay liable in a large sum. It appeared that upon the report coming for confirmation by the interlocutor of the Court, Mr. M'Aulay had not taken objection to it in writing, shortly stating the reasons of his objection, and without that no further proceeding could have been had; for, by the Act of Sederunt, that order and deliverance of the Court so made, without any written objection to the auditor's report, must be final; that is admitted: but then, after the first remit to the auditor, answers were put in by Mr. M'Aulay to the petition, and upon those answers the Court made an interlocutor, which gave rise to the doubt that continues to encumber the question. The Appellant set forth several items, for which he said there is no ground, and he gave the reasons, and he set forth the conduct of Mr. Robertson, in respect of the bills delivered in by Messrs. Adam & Brown, as amounting to a gross fraud, to the fabrication of imaginary and fictitious items, and to the still more elaborate machinery of fraud, which consists in actually fabricating papers as having been written by Adam & Brown, for the

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instruction of counsel, in causes long since at an end, and in which causes, no such papers had ever been written by them, or by any person, for the instruction of any counsel at all. This is a direct charge of fabrication, and of the most discreditable nature, on the part of Robertson; and though the answer did not bring the participation in the fraud as a charge against Adam & Brown, yet, no doubt they are charged with it by implication; for they are stated to have employed Robertson, and to have used the accounts so fabricated by him; and lest any doubt should remain that this was to let in an insinuation, though not a charge in distinct terms, Adam & Brown are said in distinct terms to have made an offer to Mr. M'Aulay after using the accounts, and in order to stifle further inquiry. I look upon the answers as raising the charge of fabrication against Adam & Brown, and charging, by something more than implication, a participation in Robertson's fraud, and that groundless charge may prove not immaterial to the question which has arisen touching the expenses of these proceedings. Answers to this purport having been given in, another interlocutor was pronounced by the Court, on the 8th of March 1832, of a peculiar nature; not the ordinary and usual remit (that remit had been given before, and that remit was now ripe to be acted upon), but it was an additional order, upon circumstances emerging out of the first remit, and as adding something to the inquiry which the first order charged the auditor to make. I say, adding something to the inquiry, and I say so advisedly; because, from all I can see of these proceedings, either as far as is stated, or upon the face of the interlocutor of March 1832, or upon the face of the report of the auditor, I conceive that the auditor had omitted to mention the

earlier order, which was an order of course, and has mentioned only the second order, which has given him additional instructions. He ought to have stated both these orders, as he has proceeded upon them, and that is very material. The second order is not a direction to tax, and if the second order had stood alone, the auditor would have had no right to tax. It is this: "The Lords having resumed consideration of this petition, with the answers thereto, and heard counsel for the parties, appoint them to be heard before the auditor, (that is, it gives him the power to hear), grant commission to him for this purpose (that is, to hear), and instruct him to report specially on the different subjects on the points in question, to the Court therein, and grant commission and diligence to the parties for citing witnesses and havers in common form." There is not a word here about taxing; he has no right by force of this order to tax; it only authorizes him and commissions him to hear the parties, and report specially upon the different subjects and points in question. Nevertheless, the auditor has taxed the bill from beginning to end, and taxed off 219 *l.* therefrom. He proceeded to do that regularly, independently of this order of the 8th of March 1832, by the order of December 1831; for, as that order stood, it was not interfered with, much less annihilated, by the order of the 8th of March following, or by any rescinding process of the Court, or by efflux of time, or by any alteration of circumstances or parties; certainly, therefore, that order stood with the second, and the auditor found himself acting under the exigency of two orders, a direction to tax and to report special circumstances; he was bound to follow both those orders, and to execute them. He did proceed; and then one party says, he did not comply with the

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second, because he did not follow the instruction to report specially upon the different subjects and points in question therein, (and by "therein" I apprehend they mean "in the petition and answers"); and this order desires him to report specially, instead of making the taxation generally. I say he did not report specially, but reported by taxing off 219*l*. from the account that had been sent in; that, in the meantime, a great many items were abandoned, is admitted; that they were never before the taxing officer seems not to be disputed; and at length the question came before the Court upon the auditor's report and taxation. Now, why did not the Appellant take that objection before the Court below, which is not mainly but solely relied upon before your Lordships; to wit, not that items were allowed which ought not to have been; not that the sum of 219*l*. was too small, and that a larger sum ought to have been taxed off, but that the auditor had not complied with the instruction given by the second order, inasmuch as he had not reported on the special circumstances of the case, which is construed by the Appellant to mean the fraud and fabrication imputed to Robertson directly, and less directly to the Respondents. If the Appellant had then and there made the objection, and grounded upon it an application to send back the matter; not to remit in his favour upon the matter of the taxation, but to remit to the auditor, in respect of his not having performed what the court desired him to perform; if the Appellant had done that, and been well grounded in his application, the Court would conveniently, and would immediately have sent it back, if they thought a case was made out for doing so, to the auditor to make a more full and explicit report. No such thing was

done by the Appellant; he did not say a word upon the subject; he confined himself to the question of expenses alone. However material the omission in the report, (and I do not deny that the fabrication of the accounts was the evil at that time pressing sorely upon the Appellant in his application to the Court,) he never thought of making any such objection. Can there be a doubt why? Because he was perfectly aware that he could not make such an objection; that the auditor had been very strictly called upon to perform a certain duty by the second remit; and that the items relating to the vouchers fabricated, had been abandoned long ago; and I am bound to say, in justice to Messrs. Adam and Brown, that they never persisted in them at all after they discovered what Robertson had been about. The omission to say anything about fabrications, was an omission that, it is true, pressed sorely upon the Appellant here, but it pressed rather more sorely against Messrs. Adam and Brown, whose conduct was most injuriously impeached by the other party. It is rather they, than the other party, who, upon what letters we have upon the subject, and what took place, appear to have complained of the omission of that which would strengthen their case and fortify their claim to expenses; as your Lordships are aware that a professional man can give no better reason for obtaining his expenses than the failing of an injurious charge brought against his character. That was a reason, which I can well understand, why the learned counsel, who had the conduct of the cause in the Court below, said it was a mere question of expenses, but took especial care to say nothing of the cause of complaint, the omission of which is the only ground of appeal before your Lordships. Accordingly, the Court below, in those cir-

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cumstances, adopted the report of the auditor, and ordered the Appellant to pay the balance with interest from 17th November. It appeared that of the two bills of 200 *l.* each, given by the Appellant when his cattle were attached, one was paid the 23d of February; of the other we have no account. That payment of 200 *l.* ought to have been credited to the Appellant; it is not credited; and that sum, with the interest on it, from the 23d of February, will reduce the sum for which the judgment is to stand; but, with that exception, I am clearly of opinion that the interlocutor below must be affirmed.

I will now proceed shortly to state what other reasons I have for rejecting the argument of the Appellant, and agreeing with the Court below; and although in stating the facts of the case, and in the comments I have made already, sufficient reasons are, in my humble opinion, afforded to support the decision; yet, on account of the importance of the question as relating to the taxation of costs, and to the conduct of professional men, I shall more distinctly state the grounds on which I think this appeal cannot be maintained. First, Let us consider whether, in point of fact, the argument raising the objection to the auditor's report is well founded, namely, that the report did not comply with the instructions of the order of the 8th of March 1832, inasmuch as it did not contain a special report on the different subjects and points in question upon the petition. I must read the words of the order as all instruments are to be read, whether they be deeds or wills or judgments, rationally, and with a view to what must be their sense, regard being had to the subject matter of them. Can I then, in fairness, say that the exigency of that order was such as to make it imperative on the auditor to report

specially upon all subjects and points that were in question in the petition and answers. I cannot see that he was so bound; the report must have reference to the scope of the proceedings. If it had been of a two-fold nature; if it had been, on the one hand, the demand of a solicitor's bill on a private party, and, on the other hand, also an application to strike him off the roll, made by the party resisting that demand; if upon the solicitor having claimed his bill, the client not only objected to pay, but charged the attorney with malpractices, and called upon the Court to punish him, then I can understand how it would be material for the auditor, in taxing the bill, to report upon matters no longer in dispute between the parties; because, although their dispute about the bill no longer required that they should be entered into in his report, yet the other part, the punishment sought against the solicitor, might require that they should be inquired into. But there is no such second objection in this suit, or any reference to it. It never came before the Court in that way, it never was regarded by the Court in that light, it was simply with a view to the rights of the parties; that is the only question, and we cannot say that it continued to be of the slightest importance what became of the charge of fraud and fabrication, after the items connected with it were abandoned on the part of the solicitor, and no longer in dispute before the auditor. Therefore I am disposed to put upon this the reasonable and consistent construction which I have now stated to your Lordships, and to hold that the auditor, under these circumstances, was only bound to make a special report upon those matters raised by the petition and the answers, and which should continue to be in contest between the parties before him, in his office

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of auditor. Now, he has reported upon all those subjects, but he has not reported upon the matters connected with the fraud, those matters being no longer before him. This is the first answer to that which is alone the ground of the appeal.

But the second answer is material, because it is that upon which the principal stress is laid. Admitting then, that, in point of fact, the auditor did not comply with the order,—admitting for argument's sake, that my construction of the second order is wrong, and that he was bound to report upon all the questions raised by the petition and answers, whether those questions continued to be agitated before him by the parties or not,—then I am of opinion that the Act of Sederunt has not been complied with in the Court below, by the Appellant, in such a way as to enable him to take the objection to the auditor's report. It is said by the Appellant, that although, if the first interlocutor had stood alone, and the proceedings had been under it only, no objection whatever could be taken, except according to the provisions of the Act of Sederunt, by reducing the objection to writing; nevertheless, this proceeding before the auditor was not under the first remit, but under the second remit; and the second remit is a *casus omissus* in the Act of Sederunt, and of course anything done under it is not within the purview of that Act. I am of a contrary opinion, upon two grounds; first, I hold this to be a proceeding before the auditor, for the reason I mentioned in the first part of the argument, not only upon the order of remit of the 8th March 1832, but also upon the original order of remit of the 15th December 1831. I have shown that the one did not abrogate the other; that they might both stand together; and consequently the auditor proceeded as much upon

the first as the second. The first is the governing order, it is the order that commissioned him to tax; he has taxed, and is not that taxation within the scope of the Act of Sederunt? It is perfectly plain, that to take it out of the Act of Sederunt, you must clearly show facts applicable to a case to which the Act does not apply, or you must produce an exception in the Act of Sederunt, that will apply to this special case. Is there any exception? The Act is as general as words can make it; all reports, orders, and all proceedings upon taxation, must be held to be within it, because there is no qualification, no restriction whatever to confine its operation; they shall be remitted,—of course to the auditor—that applies to the amount; and the second part of the Act, by reference to the first, incorporates the first within it; and according to these regulations it is necessary, in my opinion, that the objection shall be made in writing. It says distinctly, “In case either party means to object to the report of the auditor, he shall immediately lodge with the clerk a note of his objections,” &c. There is no exception; every objection taken to every report of the auditor, is to come within the scope of the Act, and to be governed by its provisions. No objection can be made, unless in compliance with the wholesome and necessary condition of being reduced, with its short reasons, into writing, that the Court may know upon what it proceeds,—that the other party may know what he has to answer, and that the officer of the Court may see to what the party objects, and by what he will bind himself, and that endless contestation upon the items of the account, as well as upon its principle, may be prevented. A party seeking to take this case out of the Act of Sederunt, is bound to show that the Act does

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not apply to it ; and upon what ground does the Appellant attempt to do that? It is this—not that the order which originally sent the matter to the auditor, is not provided for in the Act of Sederunt, but that after that order had put the auditor in possession of the case, and bound him to proceed under it, a second order was made, calling upon him to report upon special circumstances. I can see no ground for this position, or for doubting that the party was bound by the exigency of the Act of Sederunt ; and having failed to comply with it, he came too late to take the objection in the Court below or in this House.

But, independent of these considerations, it appears to me that this whole appeal is an appeal upon costs, and this is the last of the reasons I shall urge as a ground for recommending your Lordships to affirm the orders of the Court of Session. I have granted, for the sake of the argument only, that the construction I put upon the second order was an erroneous one, and that you were to take the auditor as not having complied with the second order. I will now admit, also for argument's sake, that my second argument was wrong, and that the Act of Sederunt does not apply to this case. Then it would follow that the party was not precluded from objecting to the report of the auditor. But how does that bear upon the case? Of what avail is it to the Appellant that there should have been an omission of a report upon the subject of these fabrications? In one of two ways only can that omission bear at all against the Respondents, or in favour of the Appellant, either by showing that the fabrications took away all right in Adam and Brown to be paid by M'Aulay the items connected with the fabrications, or as affecting the question of costs, and in no other conceivable

way. As to the first head, those items are out of the question,—they were abandoned,—the auditor has not allowed them,—they never were in question after the case went into the auditor's office. On the first ground, therefore, this omission is entirely immaterial. Then, on the second ground, can the Appellant avail himself of it? No, because that second ground is, that this omission deprived the Appellant of a good argument for being allowed his expenses, and against the other parties expenses being ordered to be paid by him; that is the only argument. Then, is not that an appeal for costs? If the Court of Session had given A. his costs out of B.'s pocket, instead of giving B. his costs out of A.'s pocket, that would have been admitted to be a question of costs, and therefore not a subject of appeal. The Court of Session is said to have done this; to have given A. his costs out of B.'s pocket, instead of the contrary, by means of another order, upon which they do not require the auditor to report upon a thing that they ought to have made him report upon. That is the whole argument; that the Court of Session did not give M'Aulay his costs, but made him pay Adam and Brown their costs, for want of a special report from the auditor; that if the auditor had reported specially, the Court would have allowed the Appellant his costs, but as the Court has not chosen to call for such a special report, the Appellant has not got costs, but has had to pay them. That question is particularly and exclusively a question of costs, therefore it is not a subject of appeal.

It is very likely, if we had been sitting in the Court below, we might have taken a distinction between the costs up to one point, and after that point in the case. The staggering nature of Robertson's fabrications might have inclined one to have great tenderness for

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M'Aulay in the resistance he made to a claim of any kind connected with those fabrications, made by any person who had at any time availed himself of them, though he had no share at all in the fabrication of them, though he had been unjustly impeached of that participation, and though he stood perfectly fair with the Court in respect of them; yet it might have been thought that, the Respondents having employed Robertson as their agent, they should not have received but rather paid costs up to a certain stage of the proceeding; but as that would have been a very early stage at the threshold of the Court, it would have made a difference of only a few pounds, and therefore I do not know that we need feel much regret at this course not having been pursued.

I have already said that there is no ground for any impeachment of the character of these gentlemen; and, for the reasons I have stated upon the facts of the case and the correspondence, I shall recommend to your Lordships to affirm, with the alteration before suggested, the decree of the Court below; and that alteration will be in the interlocutor last appealed from, confirming the report of the auditor; and it will consist in adding the sum of 200 *l.* to the sum of 304 *l.* 13 *s.* 8 *d.* before deducted from the account, and a clause respecting the interest on the 200 *l.*

I have not called upon the Respondent's counsel to argue this case, though I meant to suggest an alteration, because I understood they took no objection to it; the consequence is, that these circumstances will raise the question as to the costs of this appeal. Now, undoubtedly, though an appeal upon mere costs does not lie, yet if there is an appeal brought upon a substantial question, not colourable, costs may be dealt with by your Lordships. I have stated the reasons

for which I do not recommend disturbing the costs as ordered by the Court below ; and in case it should be said this is not an appeal upon costs, as there is to be an alteration of the interlocutor to the amount of 200 *l.*, it must further be observed that we cannot suffer a party to lie by and allow an error to be committed, without saying a single word to correct it, and then avail himself of that error, to the effect of letting in the question of costs, insisting that there is a blot in the decree. Why did he not remove it in the Court below ? If he did not, it was not the other party's duty to do so ; he shall not avail himself of that blot he has left, in order to thrust his hand through the decree, and reach hold of the question of costs of the appeal. If your Lordships were to allow any other course to be pursued as a general rule, you would see constant instances of little matters being left uncorrected in the Courts below, in order to let in the question of costs by way of appeal. I shall not, however, recommend to your Lordships, under the peculiar circumstances of this case, and as these Respondents have obtained more than their original demand—not, upon the ground of character or conduct, except that they have raised their demand,—I shall not recommend to your Lordships to give them any costs, after granting the principle as to costs by the observation I have made.

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Mr. *Pemberton* and Mr. *M'Niel*, on behalf of the Respondents, expressed a wish to be heard against the latter part of the judgment, refusing the Respondents their costs, and they were heard accordingly. They argued to this effect :—

It is decided that, upon the merits of the case, the judgment of the Court of Session, decreeing for the

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principal sum found due by the auditor's report, with interest, cannot now be touched. If the Appellant had meant to reserve his right to appeal against that decree, he was bound to have lodged a note of objections to the auditor's report, as expressly required by the Act of Sederunt and the rules of Court. No objections having been lodged, the report was approved of by the Court, as a matter of course; and at the same time the balance reported to be due was decreed for, and the only question remaining to be determined by the Court was as to the expenses of suit. At the moving of the report for approval, it was distinctly stated by the Appellant's counsel, that the only point remaining was that of costs, while he maintained that the Respondents were not entitled to their costs, in consequence of the great amount of charges which the auditor had struck off their accounts. By not lodging objections to the auditor's report, the Appellant gave the Court of Session no opportunity of reviewing or altering it. Unless objections are lodged, as required by the Act of Sederunt, the Court assumes, as a matter of form, that the auditor's report is right, and decerns uniformly in terms of it.

The proceedings of the Respondents in the Court of Session, for having their accounts against the appellant checked and liquidated, were regular in every respect, being not only authorised by the Act of Sederunt and regulations of Court, but expressly consented to by the Appellant himself.

The whole expenses before the auditor and the Court, having been incurred in consequence of the Appellant's refusal to accept the voluntary abatement made by the Respondents, or to allow them to withdraw the incorrect charges introduced into the ac-

counts, and of his persisting in false and calumnious charges affecting their character, he was justly subjected to those expenses.

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Lord *Brougham* would not restate the grounds of his judgment. He could not recommend to the House to give the Respondents costs of the appeal, after so large a sum as 200*l.* was now to be deducted from the sum claimed by them, and adjudged to them by the confirmed report.

It was "ordered and adjudged by the Lords, &c., that the appeal be dismissed, and that the interlocutors therein complained of, be, and the same are hereby affirmed, with this variation, that the Appellant, in addition to the deduction of 304*l.* 13*s.* 8*d.*, mentioned in the interlocutor of the 15th of February 1834, is entitled to a further deduction of the sum of 200*l.* paid by him on the 23d of February 1832, under deduction of the interest due thereon from the 17th day of November 1831 until the same was paid."



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## A P P E A L

FROM THE COURT OF SESSION.

JOHN HUTTON SYME - - - - - *Appellant.*PETER BROWN - - - - - *Respondent.**Evidence.  
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*B.*, a partner and acting director of a joint-stock company, procured for *S.*, who was not a partner, at his request, some shares in the company's stock, and received from him the purchase-money. *S.* afterwards refused to accept the transfer of the shares, and to pay the instalments that accrued due on them, alleging, as the grounds of his refusal, that he was induced to purchase the shares by *B.*'s false and fraudulent representations, and fraudulent concealment as to the credit and solvency of the company. Upon the trial of an issue directed to ascertain the truth or falsehood of these allegations, several partners in the company were admitted as witnesses for *B.*, and the Court of Session, upon a bill of exceptions, HELD, that they were competent witnesses. The House of Lords affirmed that decision.

THE question in this appeal regards the admissibility of evidence. The Edinburgh, Glasgow and Alloa Glass Company was established as a joint-stock company in 1825. The capital stock was declared by the deed of co-partnership, to be 60,000 *l.*, divided into 3,000 *l.* shares of 20 *l.* each, payable at such periods, and by such instalments, as the committee of management for the time being should direct. It was also provided by the said deed, among other things, that at the yearly meetings of the proprietors, a committee of management; consisting of a chairman, deputy-chairman, and twelve directors, should be elected;

that the business of the company should be conducted by a manager, secretary, agents and clerks, and such other office bearers as might be found necessary under the appointment and superintendence of the committee of management; that the books of the company should be balanced in April, every year, and an abstract of the company's affairs should be annually made out, and should be open to the inspection of any of the partners for one month after said annual general meetings, and no longer.

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The company purchased premises at Alloa, and erected buildings there for their manufactory. The first manager appointed for the company was a Mr. Marshall, who entered on his duties early in 1825, and ceased to hold the appointment in 1827. The Respondent was a partner and director of the concern from its commencement, and he was at one time proprietor of 140 shares. In the summer of 1827, being then appointed manager and acting director, he went to reside at Alloa to superintend the affairs of the company; and while he was there he was in the habit of frequent intercourse with the Appellant, who resided at Alloa, and had been a partner of the Stirling Banking Company, then under sequestration. The prospects of the Glass Company were often the subject of their conversation, and the result was, that the Respondent procured for the Appellant, by his desire, fifty shares in the company's stock, in May 1829, and fifty shares more in the June following, at 3 *l.* 10 *s.* per share, which was considerably below par. As the affairs of the Stirling Bank had not been settled, these shares, by arrangement between the parties, were to stand in the name of the Respondent, and the Appellant paid him the 350 *l.* In 1831 (*a*),

(*a*) See *Robertson v. Alexander*, 5 *Wilson & Shaw*, p. 1.

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when the affairs of the Stirling Banking Company were settled, and the partners in it discharged from the sequestration, the Respondent pressed to have the said shares formally transferred to the Appellant, but he refused to accept the same ; the consequence was, that the Respondent had to pay up two calls of 1*l*. each share, amounting together to 200 *l*.; and a demand of other instalments, amounting to 300 *l*., was soon afterwards made on him in respect of those shares.

In June 1832, the Respondent brought his action against the Appellant, stating, as above stated, among other things, and concluding that “it ought to be found and declared by decree, &c., that the foresaid 100 shares of the stock of the said company, were purchased for behoof of, and belong to, the defender (the Appellant), and the defender ought be decerned and ordained, at his own expense, to have the said shares regularly transferred from the pursuer to himself, according to the forms, and in terms of the contract and regulations of the said company ; moreover, the said defender ought and should be decerned and ordained, by decree, &c., to make payment to the pursuer (Respondent), of the foresaid sum of 200 *l*. sterling, advanced and paid by him as aforesaid, and interest thereof, from the respective periods of advance above mentioned, and in time coming during the non-payment ; and in the event of the pursuer being obliged to advance the other foresaid sum of 300 *l*., or any part of it, or to make any further advances or payments on account of the foresaid shares, the defender ought and should be decerned and ordained, to pay the amount of the same to him, with interest thereof from the periods of advance till payment ; as also, generally, to free and relieve the pursuer of all

calls or payments exigible, or to become exigible, by or to the said company, on account of the said stock.

The defence set up by the Appellant was, that he was induced by the Respondent's false representations of the prospects of the Glass Company, to enter into the transaction, and that being deceived by the Respondent's misrepresentation and concealment in that respect, he was not bound to take a transfer of the shares, or to be responsible for the calls made in respect of them.

The court directed the following issues to be tried by a jury; first, whether, in May 1829, the defender (the Appellant) employed the pursuer (the Respondent) to procure fifty shares of the stock of the Edinburgh, Glasgow, and Alloa Glass Company, and, in the month of June 1829, fifty other shares of the said stock, for behoof of the defender; and whether the pursuer did accordingly procure said shares; and whether the defender wrongfully fails to take delivery of the said shares, or any of them, and to pay the calls effeiring thereto, and otherwise relieve him as libelled? or, secondly, whether, by the false and fraudulent representations, or fraudulent concealment of the pursuer, as to the credit and solvency of the said company, the defender was induced to purchase the said shares, or any of them?

These issues came on to be tried in July 1834, before the Lord President of the Second Division of the Court of Session and a common jury, who found a verdict for the Respondent on both issues.

The Appellant's counsel tendered a bill of exceptions to the deliverance of the learned judge, setting forth the whole of the evidence, and particularly that among the witnesses produced at the trial, in behalf of the Respondent, was Maurice Lothian, a solicitor in

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Edinburgh, who, it was admitted by the Respondent's counsel, was then and had been for several years a partner, and also secretary of the said company; whereupon, the counsel for the Appellant took an objection to his competency as a witness for the Respondent, "in respect that he was a partner of the said Edinburgh, Glasgow and Alloa Glass Company, and as such partner was materially, directly and immediately interested in the issue of the action, inasmuch as it was for the interest of the witness that the pursuer (the Respondent), being still a partner of the company, should obtain decree in terms of the libel in this action; and in support of this objection, the said counsel for the defender (the Appellant), did offer instantly to prove, that the said Edinburgh, Glasgow and Alloa Glass Company was absolutely and irretrievably insolvent at the date of this action. But the said Lord President did overrule the said objection, and did allow the said Maurice Lothian to be received and examined as a witness for the said pursuer. Whereupon the said counsel for the said defender, did except to the foresaid opinion and deliverance of the said Lord President, and did tender their exception accordingly."

The witness was then examined and cross-examined, as were also four other witnesses, who were likewise admitted to be partners of the said company, and to whom, respectively, the same objection was tendered as was to Maurice Lothian, and upon the same grounds, and the objection was disposed of in the same way; and the same objection was taken to the deliverance of the Lord President in each case, and these witnesses also were severally examined. The bill of exceptions concluded thus: "And it being admitted by the counsel for the pursuer, that all the witnesses objected to, were part-

ners of the said company, the counsel for the defender did then and there state to the said Lord President, that, in consequence of the decision of the court allowing the said witnesses to be examined, and the turn the evidence had taken, they gave up the case; and the said Lord President did direct the jurors aforesaid, to find for the pursuer on both issues, and the said jurors did accordingly so find; and inasmuch as the said several matters before mentioned do not appear by the verdict aforesaid, the said counsel for the said defender did then and there propose the aforesaid exceptions to the opinion and deliverance of the said Lord President, in the several cases before mentioned, and requested his lordship to sign the said bill of exceptions, according to the form of the statute (a) in such cases made and provided. And thereupon, the said Lord President, at the request of the said counsel for the said defender, did sign the said bill of exceptions pursuant to the foresaid statute on the 5th day of February 1835.

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The Lords of the Second Division of the Court of Session, after hearing counsel for the parties on the bill of exceptions, disallowed the same, and found the Appellant liable in expenses by an interlocutor dated the 5th of February 1835; and on the 13th of the same month, on the motion of the Respondent, the following interlocutor was pronounced: "The lords apply the verdict in this case, and in terms thereof find on the first issue, &c. (in the affirmative thereof), and on the alternative issue, find, that the defender was not induced to purchase the said shares, or any of them, by the false and fraudulent representations, or fraudulent concealment. of the pursuer as to the credit and solvency of the said company," &c.

(a) 55 Geo. 3, c. 35.

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The appeal was against these two interlocutors.

Sir *William Follett* for the Appellant (Mr. *M'Neil*, who was to be with him, was obliged to go to Scotland):—The main question in this case is, whether the evidence of Mr. Lothian and of other partners in the company, was admissible for the Respondent on the trial of the issues. It may be a question whether, even with their evidence, there was sufficient proof to sustain the verdict. It is not denied that the company became a losing concern; the Appellant has averred, in reference to the exceptions taken to the admissibility of the witnesses objected to, that, at the date of the action, the company was irretrievably insolvent. This allegation must now be taken to be true. The Appellant has also averred on the record, that the grossest misrepresentations were held out in regard to the actual condition of the company; that reports were made out by the partners or persons employed by them calculated to deceive the public, and induce persons to come into the concern, and share the loss with them. By the constitution of this company, as well as at common law, all the partners are liable for the last farthing of the company's obligations; liable also to relieve each other of the loss sustained, in such a manner that that loss, from whatever cause arising, shall devolve equally on all the partners who are able to pay. If any partner should become insolvent, his proportion of the loss is to be diffused over the shares of all the others. It is therefore the interest of the whole to have as many members of the copartnership as possible. The object of the action was to make the Respondent a partner of the concern, to compel him to pay certain instalments said to have been advanced by the Respondent, and, as a necessary

consequence, to compel him to bear the share of the loss which has not yet been ascertained ; and its effect may be to subject him in a liability for the whole debts and obligations of the co-partnership. If the allegations of the Appellant be true, the Respondent and all the subsisting partners of the company had a material interest to induce as many persons as possible to become shareholders of the concern, with the view of obtaining the greatest possible security against being obliged to sustain more than their rateable proportion of the loss. The risk arising from the possible bankruptcy of any of the subsisting partners, who, while solvent, may be made universally responsible, materially increases the interest of all the present partners in having new parties introduced, so as to enlarge the aggregate of individual responsibility, and improve the chances of mutual relief.

Mr. Maurice Lothian, the secretary of the company, a partner and a shareholder to a large amount, was the first witness objected to, on the ground that, as such partner, he was materially, directly and immediately interested in the issue of this action, inasmuch as it was for his interest that the Respondent, being still a partner of the company, should succeed in the action. The presiding Judge overruled the objection, on the ground that as Mr. Lothian was not a party to the record, the verdict could not be used for him in evidence, and his Lordship relied on the case of *Ralston v. Rowat* (b). But his Lordship was mistaken as to the application of that case, which had no bearing on the question in this case, which is this, Had Mr. Lothian an interest in making the Appellant a partner in the company? It is the interest of all

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(b) 1 Clark & Finnelly, 424.



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concerned in a losing company, as this company was admitted to be, to have as many persons bound to it as possible, because the chance of individual loss is thereby diminished. Suppose there were ten partners in a company, and one of them became bankrupt, the loss applicable to the share of that one would necessarily devolve on the remaining nine. In a company of this kind, it is not too much to suppose that insolvencies must happen. It is a fact that a large proportion of the shareholders did actually become insolvent. The action was partly for payment of instalments said to be due, and, in effect, for relief from demands that may still be made for the liquidation of the debts of the company. It is admitted that the Respondent is bound for these instalments, and he must pay them if he is able. Is it not for the interest of Mr. Lothian to obtain a guarantee for that payment? It is impossible to deny that, if the verdict is to stand, Mr. Lothian and all the other partners will be entitled to proceed directly against the Appellant for all contributions incidental to a partnership. It is surely too much, in such circumstances, to hold that the partners are competent witnesses to establish the allegations on which such a verdict must be supported. It is a settled principle in the law of Scotland, that no witness is admissible who has a clear, direct and immediate interest in the matters involved in the action, or where his interests are affected by the verdict, in the particular action in which his evidence is offered to be adduced. The objection of interest applies most strongly against the admissibility of a witness, who happens to be a co-partner of the party who offers to adduce him in any joint stock or other trading company, and where he is called on to give evidence, the tenor and import of which necessarily affect in a

material degree the interest and the funds of that company, and of the individual partners. Accordingly Tait, a high authority on rules of evidence in Scotland, says, "With regard to creditors, they have a manifest interest to enlarge the funds, and therefore, are generally inadmissible for that purpose" (c). It is also laid down in the case of the *Bank of Scotland v. Padon* (d), that an officer of any public bank, being a stockholder, is disqualified as a witness for the bank, even as to matters falling within his official department, a majority of the judges holding that the objection of interest, although trifling in its amount, was insuperable.

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The fallacy of the Respondent's argument in the court below was, that the substitution of one solvent partner for another solvent partner was immaterial in a question *inter socios*, and that therefore Mr. Lothian had no interest in giving testimony, the effect of which was only to substitute the Appellant for the Respondent. The answer is this, that while the testimony so given tended to make the Appellant a partner, that object did not in any respect diminish the strong and immediate interest which the witnesses objected to had in substituting the Appellant as a co-partner to the extent of the stock which the Respondent was desirous of transferring to him ; for in the event of the bankruptcy of the Respondent, the chance of relief of the witnesses and of the other partners, would be necessarily diminished, while the introduction of the Appellant as a partner, would, in a corresponding degree, give additional security to those partners, that they would be enabled to operate their relief for the share of any obligations which might in that event devolve on them. In order

(c) Tait on Evidence, p. 355.

(d) Fac. Coll. 10th July 1824.

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to simplify the case, let it be supposed that a bankrupt company consisted of three partners, A. having two shares, B. having two shares, and C. the remaining two shares; let the loss upon the whole concern be estimated at 6,000 *l.*, that is, 2,000 *l.* to each, and the concern not yet finally wound up, nor the amount of the loss finally adjusted. B. brings an action against D., who is not a partner, to compel him to take a transference to one of his (B's.) shares, and therefore concluding for relief to the extent of 1,000 *l.*, or of one half of whatever loss he might sustain, and he proposes to establish his case by the evidence of A. Is it not clear that A. would have an interest to make D. a partner? because A. would thereby have the additional security of D.'s name, first, for payment of B.'s share of the loss, should B. fail; and secondly, for payment of C.'s proportion should the same calamity befall him. This is not merely a contingent and eventual interest, the interest is direct and immediate to make D. a partner, because the security is thereby instantly increased. The loss and the extent of the loss are no doubt contingent, A., B. and C. being supposed all solvent at the date of the action, or at the date when the testimony of A. is admitted. But C. might fail next day, and the loss of 2,000 *l.* might be so great as to bring down B., and then the effect would be, that A., instead of bearing the whole loss on the concern, would have D., a partner to the extent of one-sixth share, liable in the first place for 1,000 *l.*, being one-half of B.'s loss, and for a corresponding proportion of the loss on the shares of the other partners. If this view be correct in the case supposed, does it not equally bear in the actual case before the House? It is not disputed that the concern has not been wound up, nor the extent of the loss and

ultimate responsibility ascertained. The number of partners only increases the additional risk, and in point of fact, several of the partners have become bankrupt.

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Questions of this kind have been frequently discussed in Westminster-hall, where objections to the admissibility of partners in cases like the present have been sustained. In the case of *Ralston v. Rowat* (e), already referred to, it was distinctly held, that the rules of the English and Scotch law are the same in principle as to the competency of witnesses. In England it is a principle, recognised as well in the courts of law as in equity, that a witness is incompetent who has any interest, however small, in the event of a suit, *Carter v. Pearce* (f); *Radburn v. Morris* (g); *Vaughan v. Worrall* (h); Starkie on Evidence (i), Phillips on Evidence (k). It is important to consider, how far this test may be applied to the present case; assuming that a creditor of the company sued one of the witnesses objected to, and that such witness sought to enforce his claim for contribution against the present Appellant, could the verdict in this case be used as evidence for the witness? Certainly it might; and the record of an issue to try the fact of partnership has been admitted as evidence of that fact, *Whatley v. Menheim* (l). This question was much discussed in the Court of Exchequer, in a case arising out of *Roe v. Brenton*: The lease of the manor of Trington was objected to; Lord C. B. Lyndhurst said, that was not a ground to send the case down for a new trial; and

(e) 1 Clark & F. 424.

(f) 1 T. Rep. 163.

(g) 3 Carr. & P. 254.

S. C. 4 Bingh. 649.

(h) 2 Swan. 395-399.

(i) 105 et seq. 6th edit.

(k) P. 59.

(l) 2 Esp. 608.

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Lord *Teynham* v. *Tyler* (*m*) was referred to. A similar question was raised in the Court of King's Bench a few days ago, as to the admissibility of documents. The question came to this, whether the verdict against the Appellant could be used for Mr. Lothian in another action? It clearly might, and therefore Mr. Lothian was not an admissible witness in the case.

Dr. *Lushington* and Mr. Serjeant *Spankie* for the Respondent:—It was not competent for the Appellant to present a bill of exceptions after formally abandoning the case before the jury, producing no evidence himself, but preventing the Respondent from producing the whole of his evidence. The Appellant in that proceeding disregarded the enactment of the 7th section of the act 55 Geo. 3, c. 35 \*. Instead of allowing the trial to proceed, he stopped it short and gave up the case. The Appellant therefore did not bring his case within the statute at all when he presented the bill of excep-

(*m*) 6 Bingh. 390 & 561.

\* By that section it is enacted, that "it shall be competent to the counsel for the party at the trial of any issue or issues to except to the opinion and direction of the Judge or Judges before whom the same shall be tried, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial; and that on such exception being taken, the same shall be put in writing by the counsel for the party objecting, and signed by the Judge or Judges; but, notwithstanding the said exception, the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and assess damages when necessary; and after the trial of every such issue or issues, the Judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue or issues, and a copy of the verdict of the jury indorsed thereon, to the Division by which the said issue or issues were directed, which Division shall thereupon order the said exception to be heard in presence, on or before the fourth sederunt day thereafter."

tions; if this course of proceeding were sanctioned, it would, in many cases, lead to the greatest hardship and injustice. The case for the Respondent was opened—a large part of his evidence was disclosed—but the Appellant kept back his evidence so that its import, and possibly its meagreness, were carefully concealed from the court. If a party were allowed to prosecute a bill of exceptions in such a case, he would be in a far better situation by violating the statute, than by following it out. For if the trial had proceeded, and the Appellant produced any evidence, the court would have been bound to refuse a new trial, if that evidence had been plainly defective; and the Respondent would then have been entitled to argue, that the admission of the witnesses excepted to was entirely immaterial, because the Appellant's evidence failed to prove deceit and misrepresentation on the part of the Respondent. The courts of law in England will not grant a new trial on the ground that evidence had been admitted which ought to have been rejected, if, exclusive of such evidence, there be enough to warrant the finding of the jury. *Doe d. Lord Teynham v. Tyler*(*n*). In the case of *Alexander v. Barker*(*o*) the rejection of evidence, which, if admitted, would merely prove a fact established by other evidence, was held to be no ground for a new trial. The same principle has governed the decision of the Scotch courts in reference to new trials (*p*). The first issue in this case was proved by a mass of evidence quite irresistible. The second issue was properly the Appellant's issue; if he had produced any evidence, the Respondent would have had it in his power to show, that it was altogether trifling and inconclusive, or that it was repelled by the

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(*n*) 6 Bingh. 561.                      (*o*) 2 Cromp. & Jer. 133.  
 (*p*) See 3 Murray, pp. 367 & 529.

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Respondent's proofs, altogether independent of the evidence to which exception was taken.

It is difficult to understand the exact nature of the objection taken at the trial, and set forth in the bill of exceptions, to the admissibility of the witnesses in question. It is necessary to know precisely the grounds on which a party asks for a new trial, before he is allowed to gain an object involving such serious consequences to his adversary, both as regards delay and expense. Has the Appellant stated any reason for holding the witness in question inadmissible? He has set forth in his bill that the witness was incompetent in respect that he was a partner of the said Edinburgh, Glasgow, and Alloa Glass Company, and as such partner was materially, directly, and immediately interested in the issue of this action, inasmuch as it was for the interest of the witness that the Respondent, being still a partner of the company, should obtain decree in terms of the libel in this action. The glass company were not parties to the action in any shape, and therefore the objection to the witness cannot rest on that ground; neither is it pretended that the witness was liable with the Respondent in the expenses of the suit, or was connected with him by relationship. A party taking an exception to the admissibility of evidence is bound to set forth on record, in clear and unequivocal terms, the grounds in law or fact on which he rests his objection. He is bound to do so in justice to the presiding judge, who is called on to dispose of the objection; and he is doubly bound to do so in justice to his adversary, whose interests are so deeply involved.

The court, in judging of an objection to the admissibility of a witness on the ground of interest in the suit, cannot travel out of the bill of exceptions to

see whether in fact there is such an interest. But in this bill of exceptions no interest is stated, on the ground of which the witness could be rejected, and the objection stated by the Appellant was, in any view that can possibly be taken of it, utterly groundless in itself, and was properly overruled by the presiding judge. The alleged interest in the shareholders was, on the Appellant's own showing, totally insufficient to disqualify any witness. His plea of interest came to this—"It was the interest of all the shareholders to make the Appellant a partner of the company, because it was bankrupt in its stock; large contributions were necessary for loss; and it was advantageous for the company to have a new partner like the Appellant, liable for that loss, instead of the Respondent, who was previously liable for his own original shares." No doubt, if the Respondent had been bankrupt, then the Appellant might have pleaded that the shareholders had an interest in getting one hundred shares of the stock transferred from him to a solvent partner. But as no such averment was made, it must be held that the Respondent was just as able to pay any contribution on the stock as the Appellant was. If a question arose in any of the English courts respecting the sale of a few shares of any of the great mercantile companies, such as the Bank of England, the fire-offices, or even any of the later joint-stock companies, could an objection of interest be gravely stated in a trial respecting specific shares, if any of the conferences relative to the bargain were proposed to be proved by witnesses who had no connexion with the parties, except holding other shares in the same company? The law of England and of Scotland is the same on this point.

In this case it was more the interest of the shareholders to have the Respondent continued as their

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partner, than the Appellant, who was so recently under sequestration as partner of a banking company. There was not a shadow of reason for the shareholders preferring the Appellant to the Respondent, and therefore there was no reason to hold the witnesses as interested, or even to find them biased as if they had been ordinary creditors of the Respondent. It is laid down in a book of great authority that "a mere contingent benefit which may result to the witness from the event of the suit, (as that it may possibly be more easy for him to establish his own claim, in case the party calling him should succeed,) can only affect his *credit*, and not his competency, unless the verdict would be evidence for him (*q*); and Lord Eldon, in the case of *Vaughan v. Worrall* (*r*), said, "The interest, to disqualify, must be a direct interest in the event of the cause; and courts of justice have of late struggled to convert objections to the competence, into objections to credit." And in the Scotch courts the same doctrine has been held, as in the case of the *Earl of Fife* it was settled, that "it is a direct, not a contingent, interest that disqualifies a witness. A person who is liable in damages, whichever way his evidence is given, is a competent witness (*s*).

But there is still a separate ground, besides the absence of interest, on which the witnesses objected to would be admissible. The facts to which they were called to speak, were those which fell specially within their knowledge, and which no other witness could be held to be so fully and accurately acquainted with. In *Middleton v. Frost* (*t*), it was held, that an inhabitant of a parish was a competent witness to prove payments of rates to the collector, *ex necessitate*.

(*q*) Phillipps on Evidence, c. 5, s. 1.

(*r*) 2 Swanst. 395.

(*s*) Murray, pp. 130 & 144.

(*t*) 4 Carr. & P. 16.

The facts here brought the witnesses objected to within that rule. The Appellant alleged, that he had purchased the shares on the false and deceitful representations of the Respondent alone, and in utter ignorance of the affairs of the company. But the partners and directors, who best knew the affairs of the company, completely negatived that averment, and proved that the Appellant had applied in all proper quarters to get the necessary information respecting the affairs of the company. It would be strange if the best evidence to prove the state of facts on such a point were to be excluded.

The bill of exceptions was properly disallowed on this further ground, that enough was proved *aliunde*, and exclusive of the witnesses objected to, in order to entitle the Respondent to a verdict. It was clearly established by the witnesses to whom no objection was made, that the Appellant had been resident at the seat of the works for many years, that he was incessant in his inquiries of directors, partners, and workmen respecting the prospects of the company.

Lord *Brougham*:—My Lords, I do not think it is necessary to give your Lordships the trouble of going through the arguments in this case. I am clearly of opinion that the interest of the witnesses objected to in this case is not that direct and immediate, and substantial, and pecuniary interest which would disqualify any of those witnesses from giving evidence on this trial. I think the Court below have properly admitted this evidence, and I am satisfied that there are some cases referred to in the argument which afford a precedent for what has been done in the Court below.

The appeal was ordered to be dismissed, with costs.

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May 27.

## APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

The Rev. MARCUS MONCK, Clerk - - *Appellant.*

CHARLES HENRY PAGET, Esq.; Sir	} <i>Respondents.</i>
CHARLES PAGET, and Dame ELIZA-	
BETH, his Wife; DOMINICK BROWNE,	
Esq., and CATHERINE, his Wife;	
and HENRY GEO. MONCK BROWNE,	
an Infant, by his next Friend - -	

*Practice.*

G. P. Monck's estates in Ireland—being charged with a jointure for Lady Araminta, his wife, by their marriage settlement, whereby also he covenanted for payment to her of the sum of 300 *l.*, by his heirs, executors or administrators, out of his real or personal estate, immediately after his decease—were, in the year 1777, settled to his own use for life, with remainder to Henry Monck, his eldest son, in fee, subject to a trust term for raising a sum to be applied as by deed or will he should appoint. He died in 1804, having by his will bequeathed, among other things, all rents and arrears of rent due to him to Lady A., her executors and administrators, and he appointed her sole executrix. Lady A. declined to prove the will; Henry Monck obtained letters of administration, with the will annexed, received the rents, &c., and died in 1815, having by his will devised all his real estates to trustees for the use of his two daughters, their husbands and issue respectively, in strict settlement, subject to a trust term for raising a fund to pay his debts, legacies and annuities; and he thereby directed payment of 200 *l.* a-year to Lady A. and her assigns for her life, in addition to her jointure; and gave her a legacy of 500 *l.*, payable in twelve months after his decease; and he gave an annuity of 400 *l.* a-year to Ann Monck, his sister, in case she survived Lady A., and upon condition of her releasing his real

estates from all claims; and he appointed Lady Elizabeth, his wife, his executrix. She proved the will, and filed a bill in Chancery against Lady A. and Ann Monck, against the testamentary trustees of the last-mentioned term, and of the inheritance of the devised estates, and against the persons beneficially interested therein, praying that the trusts of the will might be carried into execution, and that accounts might be taken of the debts and legacies of the testator, and of the charges affecting the real estates, &c. Lady Araminta, in her answer, claimed to be entitled to receive out of the real estates, in addition to her jointure, the said sum of 300 *l.*, with interest from her husband's death; and the said annuity of 200 *l.* and legacy of 500 *l.*, together with all the rents and arrears that were due to G. P. Monck at his death, and a proportionate value of the timber planted by him on the devised estates.

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The usual decree for an account, &c. having been made in 1818, and Lady A. having died before any further steps were taken in the cause, Ann Monck, her residuary legatee and sole executrix, proved her will and carried in a charge before the Master in pursuance of the decree, and thereby claimed as such executrix the annuity of 200 *l.* and the legacy of 500 *l.*, omitting the other claims made in Lady A.'s answer; and in her own right she claimed the annuity of 400 *l.*, offering to release the estates of Henry Monck from all other claims. A final decree was made in that cause in 1821, and enrolled in 1822. In 1831 a second suit was instituted for sale of part of the devised estates, and a decree to that effect was made, and enrolled in 1832.

In 1834 Marcus Monck, the second son of G. P. and Lady A. Monck, having in 1832 obtained administration *de bonis non* to their respective estates, and also to the estate of his sister, Ann Monck, who died in 1830, moved the Master of the Rolls *for leave to prove before the Master* in the first cause the unproved demands of Lady A., or *to file a supplemental bill*, which motion being refused, he then moved the Lord Chancellor for leave to file a supplemental bill, or such other bill as he might be advised. That motion

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also was refused. Upon appeal from his Lordship's order, the Appellant sought to make a case for leave to prove before the Master, under the decree of 1821, the unproved demands of Lady A., or for a bill of review. **Held** by the Lords, without giving any judgment on the merits, that the Lord Chancellor properly refused the motion for leave to file a supplemental bill, and that the appeal was irregular in point of form, in asking for relief which was not asked of the Court below, the order of the Master of the Rolls refusing that relief not being appealed from.

**P**REVIOUS to the marriage of George Paul Monck, esq., with the Lady Araminta, his wife, (the father and mother of the Appellant), a marriage settlement was executed (dated the 22d of April 1755), whereby the estates of the said G. P. Monck, situated in the county of Westmeath in Ireland, were settled on him and the issue male of the marriage in strict settlement, charged with a jointure of 800 *l.* a year for the Lady Araminta, payable half yearly; and G. P. Monck thereby covenanted, that, in case she should survive him, his heirs, executors or administrators, should, out of his real or personal estate, pay her 300 *l.* immediately after his decease. In the year 1777, G. P. Monck and Henry Monck, the eldest son of the marriage, suffered a recovery of the settled estates, and by deed declaring the uses of the recovery, (dated the 3d of December 1777,) they were limited to the use of trustees for a term of one thousand years, and subject thereto to the use of G. P. Monck for life, with remainder to the use of the said H. Monck in fee. The trusts of the term were, by sale or mortgage of the estates, to raise such sums of money (not exceeding 15,000 *l.*), and to pay and apply the same in such manner and for such purposes as G. P. Monck, by any writing under seal, or by his last will, should direct and appoint.

George Paul Monck died in October 1804, leaving Lady Araminta, his widow, and H. Monck, his eldest son, and other children, having by his will, (dated the 24th of May 1790,) bequeathed all his ready money, rents, and arrears of rent due and owing to him at his decease, household goods and furniture, with the lease of his house in Bath, and all his personal estate, to Lady Araminta, her executors and administrators, subject to the payment of his funeral and testamentary expenses and simple contract debts only, declaring it to be his intention, that the property so given to her should, as far as in his power, be exonerated from payment of his bond debts, judgments, mortgages and other incumbrances, which he directed should be charged on his real estates only, and he appointed her sole executrix of his will. He afterwards, by a codicil, (dated the 25th of May 1792,) restricted the bequest of his household goods and furniture, with the lease of his house at Bath, to the natural life of Lady Araminta, bequeathing it over after her decease to his daughter, Ann Monck, her executors and administrators, but confirmed his will in all other respects. Lady Araminta declining to act as executrix, Henry Monck took out letters of administration, with the will annexed, and possessed himself of the personal estate, and received the rents and arrears of rent of the real estate, owing to G. P. Monck at his death, but never, as the Appellant alleged, accounted for them to Lady Araminta Monck.

Henry Monck died in 1815, having by his will devised all his towns, castles, lands and other hereditaments, to the use of trustees therein named, for a term of four thousand years; and subject thereto he devised one moiety of the said hereditaments to other trustees in the will named, during the life of his daughter.

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the Respondent Catherine, wife of the Respondent Dominick Browne, upon trust to pay the rents and profits of the said moiety to her separate use, during her life; and after her decease to the use of the said Dominick Browne for life, with remainder to the use of their second son in tail male, with divers remainders over; and he devised the other moiety of the said hereditaments, subject to the said term, to the use of the last mentioned trustees, during the life of his daughter, the Respondent Elizabeth, wife of the Respondent Sir Charles Paget, upon similar trusts, for her separate use; and after her decease to the use of Sir C. Paget for life, with remainder to their eldest son in tail male, with remainders over. The trusts of the term were declared to be, by sale or mortgage, to raise such sums as should be sufficient to pay the testator's debts, funeral and testamentary expenses, legacies and annuities. The testator, among other bequests, directed the payment of 200*l.* a year to his mother, Lady Araminta, and her assigns, during her life, in addition to her jointure of 800*l.* under the above recited settlement, and 400*l.* a year to his sister Ann Monck, in case she should survive Lady Araminta, but upon the express condition that she released his estates from any claim that she might have on them. He also gave a legacy of 500*l.* to his mother, to be paid at the expiration of twelve months after his decease, and he gave all his personal estates and effects to his wife, Lady Elizabeth Monck, absolutely, and directed that, if any of his debts should be paid out of his personal estate, Lady Elizabeth should in that case be entitled to be reimbursed out of the premises comprised in the term of four thousand years, and he appointed her sole executrix of his will. At the testator's death the Respondents, Catherine

Browne and Dame Elizabeth Paget, were his only children and co-heiresses at law.

Lady Elizabeth Monck proved the will, and, in March 1816, filed her bill in Chancery in Ireland against Lady Araminta Monck, Anne Monck, Dominick Browne and Catherine his wife, Charles Paget and Elizabeth his wife, and Charles Henry Paget, their eldest son; making also the testamentary trustees of the term of four thousand years, the trustees of the fee of the estates, the incumbrancers thereon, and several others interested under the will of Henry Monck, parties defendants. The bill, after setting forth the said will, and stating, among other things, that the testator was indebted at the time of his death to a number of persons, and that several of them had applied to the plaintiff for payment of their demands, prayed (among other things), that the defendants might set forth an account of the said real estates so devised as before stated, and the right, title, interest, &c., they respectively had in them, &c.; that Ann Monck might elect whether she would accept the said annuity of 400*l.*, releasing all other claims which she might have to the said estates, or insist upon her other claims, and that she might set forth the same respectively; that an account might also be taken of the debts, legacies, and funeral and testamentary expenses of the testator, and also of any charges affecting the said lands and hereditaments, and that the several creditors and legatees of the testator might be at liberty to come in before the Master and make proof of their several demands, and that the trusts of the will might be carried into execution, and a competent part of the lands comprised in the term of four thousand years might be sold for the purposes in the will mentioned.

The different defendants appeared and put in their

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answers to the bill. Lady Araminta Monck by her answer admitted the will of Henry Monck, particularly the bequests to her of the annuity of 200*l.*, and the sum of 500*l.*, and, with reference to the estates devised, she said that she believed they were the same estates that were comprised in the settlement of April 1765, whereby the jointure of 800*l.* and the sum of 300*l.* were secured to her, as above mentioned, but which sum of 300*l.* she alleged had never been paid to her. She in her said answer set forth the will of G. P. Monck, his death, and administration to him by the said Henry Monck, and she claimed to be entitled to receive out of the said real estates, the two annuities of 800*l.* and 200*l.*, and the two sums of 300*l.* and 500*l.*, with interest on these two sums from the periods when the same respectively became payable, together with all rents and arrears of rents that were due to G. P. Monck at the time of his decease, and she also claimed such proportion of the value of the timber planted by G. P. Monck on the said estates, as he was entitled to under the Irish statutes in that behalf: she also claimed all the residue of his personal property, after payment of his simple contract debts, &c.

Ann Monck also by her answer, admitted the will of Henry Monck, especially the bequest to her of the annual sum of 400*l.*, and she claimed that annuity, and brought forward several other claims against the said estates, and declined to elect as prayed by the bill until her rights and claims were ascertained.

These answers were replied to, but no evidence was gone into, and the cause coming on to be heard on bill and answer in Nov. 1818, a decree was made whereby it was ordered, among other things, that the Master should take an account of the debts, legacies and funeral expenses of the testator Henry Monck, and

also an account of the debts, charges, and incumbrances affecting his real estates, and of the rents and profits thereof, &c. And it was declared that Ann Monck was bound to make her election between the reversionary annuity bequeathed to her by his will, and her other claims in the pleadings mentioned affecting the estates, before she was permitted to file any charge in the Master's office under the decree; and it was further ordered, that all creditors and legatees of Henry Monck, and all persons having debts, charges and incumbrances affecting his estates, should have liberty to come in before the Master to prove the same.

Lady Araminta Monck died in 1818, soon after the pronouncing of the decree, and before any further proceedings were had in the cause, having by her will appointed her daughter, the said Ann Monck, her sole executrix, who accordingly proved the will, but no bill of revivor was filed in the said cause, for the purpose of bringing her, as the personal representative of Lady Araminta Monck, before the Court.

Ann Monck, in July 1819, carried into the Master's office, her charge under the said decree, and thereby claimed to be entitled, as the executrix of Lady Araminta Monck, to the arrears of the annuities of 800*l.* and of 200*l.*, and also to the legacy of 500*l.*, with the interest due thereon. She also elected to take the annuity of 400 *l.*, bequeathed to her by Henry Monck, and offered to release his estate from any other claim that she might have thereon. But she did not, either by her said charge, or otherwise, in her lifetime, bring forward the several other claims set forth by Lady Araminta Monck in her answer.

The Master by his report (dated January 1821) found that Ann Monck was entitled, as executrix of Lady Araminta, to an arrear of 500*l.*, on foot of the

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said annuity of 200 *l.*, and also to the legacy of 500 *l.* bequeathed to her by Henry Monck, with interest on both sums, and that she was also entitled under Henry Monck's will to her annuity of 400 *l.*

No exceptions were taken to the report; the cause came on for further directions in March 1821, when by a decree then pronounced, and which was enrolled in Nov. 1822, it was, amongst other things, ordered and decreed, that the Respondents Dominick Browne and Catherine his wife, Sir Charles Paget and Elizabeth his wife, or some one of them, should pay to the plaintiff and the several defendants and creditors their respective demands, with interest, and also the costs of the defendants; or in default thereof, that the Master should, within six months, sell the several towns and lands comprised in the said term of four thousand years, for the residue of the term, for the purpose of paying the incumbrances.

No sale took place under that decree. In November 1831 the Respondents filed their bill against Lady Elizabeth Monck, and the trustees of the fee of the real estates under Henry Monck's will. The bill set forth the will of Henry Monck, his death, and the probate of his will by Lady Elizabeth Monck, the original bill filed by her, the said order of November 1818, the Master's report, and the said final decree of March 1821; and it stated, that the Respondent Henry George Monck Browne was born after the date of the decree, and that under the limitations of the said will he was entitled to an estate tail in a moiety of the said estates upon the decease of the survivor of Catherine and Dominick Browne, and that no sale had been had of the estates comprised in the said term, and that it would be greatly for the benefit of all parties interested in the said estates that a sale of the fee and inheritance of a

competent part thereof should take place with the said trust term, instead of the said trust term only, and that the money arising from such sale should be applied in payment and discharge of the debts, charges, and incumbrances affecting the said estates. The bill accordingly prayed that the fee and inheritance of the hereditaments and premises in the said trust term contained might be decreed to be sold, and that the proceeds might be applied to discharge all debts and incumbrances affecting the same.

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The defendants to that bill having put in their answers, the cause came on to be heard upon bill and answer in May 1832, when it was ordered and decreed as prayed. That decree was enrolled in the November of the same year. Ann Monck died in September 1830. The Appellant obtained letters of administration *de bonis non* to the estate of Lady Araminta Monck, and administration to the estate of Ann Monck, in February 1832; and he also obtained letters of administration *de bonis non*, with the will annexed, of his father G. P. Monck. On the 20th of January 1834, the Appellant, as administrator of Lady Araminta Monck, moved the Master of the Rolls in Ireland, in pursuance of notice entitled in both causes of *Monck v. Browne* and *Paget v. Monck*, “that he *might be at liberty to go before the Master* in the said *first* cause, and file a charge and proceed thereunder to prove the several unproved demands made by the Lady Araminta Monck in her said answer, (viz. *first*, her claim of 300*l.* with interest, under the settlement of 1755; *secondly*, her claim on foot of rents, and arrears of rents of the lands and premises in the said settlement and pleadings mentioned, which were due to G. P. Monck at the time of his decease, and by him bequeathed to Lady Araminta, subject only to his simple contract debts, and

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funeral and testamentary expenses, and which, to the amount of 7084*l.* 1*s.* 11*d.*, were received and retained by Henry Monck as his personal representative; and *thirdly*, her claim to G. P. Monck's proportion of the value of the timber trees planted by him on the said estates as tenant for life thereof, pursuant to statute in such case made and provided, and which said several claims were by inadvertence omitted to be proved by Ann Monck, the former personal representative of Lady Araminta in the cause of *Monck v. Browne*, and which she was entitled to prove against the outstanding estates of H. Monck;) *or otherwise, that the Appellant, as such personal representative of Lady Araminta Monck, might be at liberty to file a supplemental bill, or such other bill as he might be advised, for the purpose of establishing such demands, &c.*

The Master of the Rolls declined to make any order on that motion.

On the 31st January 1834, the Appellant, pursuant to notice entitled in both causes and served on the Respondents, moved the Lord Chancellor of Ireland "*for liberty to file a supplemental bill in the first mentioned cause, or such other bill as he might be advised, for the purpose of establishing the several unproved and unadjudicated claims made by Lady Araminta Monck in her answer in that cause, and as specified in the Appellant's affidavit filed in that cause on the 11th of January instant, or for such other order as to his Lordship should seem meet, &c.*

Two affidavits were read in support of this motion; one of them, being the affidavit of the Appellant, and entitled in the first cause, and which was also used in support of the motion before the Master of the Rolls, was to this effect:—It stated the bill in the first mentioned cause, the answer of Lady Araminta Monck

thereto, and the decree of November 1818 therein pronounced, and that Lady Araminta died before any further proceeding was taken therein, having appointed the said Ann Monck her executrix. It then stated that Ann Monck filed her charge in the said cause as hereinbefore mentioned, but omitted the several other claims made by Lady Araminta in her answer; that is to say, the said claim of 300 *l.* with interest from the death of G. P. Monck, all or any claim on foot of the rents and arrears of rents of the said settled and devised estates due to him at the time of his decease, and amounting to 7084 *l.* 1*s.* 11*d.*; and also the claim of the value of the timber trees planted by G. P. Monck on the said settled and devised estates as tenant for life thereof, and which amounted to the sum of 5000*l.*; the affidavit then stated the Master's report of January 1821, the said decree of March 1821, and the proceedings in the second cause; it then stated the death of Ann Monck in 1830, and that she had, ever since the death of Lady Araminta, her mother, resided in England, and was wholly unacquainted with the facts relating to the said unproved claims of Lady Araminta, and that she was during her life-time quite incompetent to have instructed her solicitor as to the facts and proofs incidental to those claims; the affidavit then stated, that letters of administration, with the will annexed, of Lady Araminta were granted to the Appellant in February 1832, and that thereupon he caused application to be made to the solicitor employed by Ann Monck as such executrix as aforesaid for the papers which had belonged to her in such right; and that considerable delay took place therein before the Appellant's solicitor received the same, and that thereupon very tedious searches and inquiries became necessary, and were entered into on the part of the

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Appellant in order to ascertain the grounds on which those unproved claims were founded; and that the Appellant's solicitor used the utmost diligence to investigate the same.

The other affidavit read in support of the motion before the Lord Chancellor was the affidavit of Mr. Henry Murphy, the Appellant's solicitor. It stated, among other things, that in November 1830, the said Henry Murphy received instructions from the Appellant to procure letters of administration to Lady Araminta Monck and Ann Monck, and that he was not able to obtain the same until the month of February 1832; that upon obtaining such administrations, he was instructed to apply for, and, after much delay, succeeded in obtaining from their solicitor the papers and documents in the first mentioned cause belonging to them, and that, upon inspecting such papers, it appeared that certain claims made by Lady Araminta in her answer, and specified in the affidavit of the Appellant, had never been put forward by her said executrix. The affidavit then stated, that the reason why such claims were not put forward, was, that Ann Monck and her solicitor had not in their power any evidence to prove the same; and that it appeared by a case submitted to counsel by her said solicitor, for the purpose of preparing proofs in the first mentioned cause, that Lady Araminta Monck and Ann Monck, were not prepared with evidence as to the planting of timber, nor as to the arrears of rents, from want of certain accounts referred to in the said case, nor as to the claim under the said marriage settlement, from want of the original deeds of April 1755 and of December 1777. The affidavit then stated that due diligence was used at the time to obtain the said deeds, and that a notice in writing had been served on the

plaintiff in the first cause, requiring the production of the said deeds, and that no answer had been returned thereto, and that a fruitless application and search had been made for the original accounts on which the claim to the arrears of rents was founded. The affidavit further stated that, in the months of July and October last, Henry Murphy and the Appellant had made two visits to the lands in the pleadings mentioned, and that on such occasion, Henry Murphy had discovered sufficient evidence to sustain Lady Araminta's claim for the planting and value of the timber mentioned in her answer, and he had also discovered the name of the gentleman who had been conducting clerk and assistant to the land and law agent of Henry Monck, and by his means obtained access to the papers which had belonged to the said testator's agent, amongst which the original accounts were found, and were then in the deponent's possession.

The Respondents opposed the motion, and grounded their opposition on the reasons appearing in the affidavit of Mr. Dobbin, their solicitor, which was read by their counsel, and which stated, among other things, that the final decrees in the two causes were enrolled in November 1832; that Ann Monck, in her answer in the first cause, relied on her claims under the marriage settlement of G. P. Monck; that Henry Monck bequeathed the annual sum of 200*l.* to Lady Araminta during her life, and also a legacy of 500*l.* and to Ann Monck an annuity of 400*l.* during her life, upon condition of her releasing his estates from any charge, claim or demand that she might have thereon. The affidavit then stated that, about the 1st day of July 1819, Ann Monck filed her charge under the first decree in her own right, and as executrix of Lady Araminta, claiming as above mentioned; that the said

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charge was duly proved, and the amount thereof, and of the annuity of 400 *l.*, had been paid from time to time out of the funds in the cause, partly to Ann Monck, and partly to the Appellant since her decease: that Lady Araminta Monck, by her last will bequeathed to Ann Monck 3000*l.*, to the Appellant 1000*l.*, and the residue of her estate and effects to Ann Monck, and appointed her executrix. The affidavit further stated, that the deponent was altogether unacquainted with the demands stated in the Appellant's affidavit; that all the persons who must have been acquainted with the facts relating to the said demands were dead.

The Lord *Chancellor*, by an order bearing date the said 31st day of January 1834, refused the motion, with costs.

The petition of appeal prayed that that order be reversed, or that the Appellant might have such other relief in the premises as to this House should seem meet.

Mr. *Wigram* and Mr. *Lancelot Shadwell*, for the Appellant:—The unproved claims of Lady Araminta Monck, which her personal representative seeks to establish against the real estates of Henry Monck, consist, first, of the sum of 300 *l.*, with interest from the death of G. P. Monck, in 1804; secondly, of the rents and arrears of rent that were due to him from those estates at the time of his death, which exceeded 7000 *l.*, as appears from the agent's accounts; and, thirdly, of such proportion of the value of the timber planted by him on the estates, as he himself was entitled to as tenant for life under the Irish statutes for encouraging the planting of timber trees. To the first of these claims she was entitled under the covenant in her marriage

settlement, by which her husband bound his heirs and executors to pay that sum out of his real and personal estate immediately after his death. By his will he exonerated his personal estate from specialty debts, and directed them to be paid out of the real estates, which had been demised for a term in trust to raise money for such payments. Henry Monck was both heir and executor, and in either character bound by the covenant, but he never paid that debt. The rent and arrears of rent were expressly bequeathed to Lady Araminta, and the general bequest to her of the personal estate, carried her husband's proportion of the value of the timber planted by him.

These were all subsisting charges on the estates at the time of the decease of Henry Monck. Those who represent him and his estates, cannot object that Lady Araminta's representatives have not made these claims in due time, for as he was both heir and acting executor of his father, and received the rents and possessed himself of the personal estate, he ought to have discharged those liabilities. On his death in 1815, in answer to the bill then filed, Lady Araminta distinctly set forth her claims.

[*Lord Brougham*: This appears to be an appeal motion. I do not remember such an appeal in this House, but I do not deny our jurisdiction.]

The form is as your Lordship has stated : an appeal motion was made to the Lord Chancellor of Ireland, for leave to file a supplemental bill to establish those claims, the Master of the Rolls having refused to make any order on a former motion made before him partly for the same purpose. There was unquestionably a valid charge in respect of those claims on the estates of Henry Monck, capable of being enforced at the

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time of his death. He devised the estates to trustees, subject to a term also in trust, and seventeen years have elapsed since Lady Araminta's death; but a lapse of twenty years even will not bar equitable claims in circumstances not affording presumption of satisfaction: *Pickering v. Lord Stamford* (a).

[Lord Brougham: Why limit yourselves to twenty years? There is no fixed limitation of time. In one case a lapse of thirty-eight years was held to be no bar under the circumstances; in another, thirty-five years did not bar equitable claims; yet in a case in this House, nineteen years were held to bar a claim under a bond, though twenty years constitute the limitation in case of a bond.]

No objection can therefore be made to these claims on the ground of delay. The period of twenty years was mentioned, because the lapse of that period was set up as a bar by the Respondents.

Another objection made to these claims is, that Ann Monck, in the charge filed by her in the Master's office, "released the estates of Henry Monck from any other charge, claim or demand whatsoever that she may have thereon, save and except the several claims thereinbefore set forth." But Ann Monck's charge, whereby she elected to take her annuity of 400*L*, in preference to the various claims which she had set forth, in her answer to the first bill, against the estates of Henry Monck, related only to what she so claimed in her own right, by virtue of her father's marriage settlement, and alleged dealings between him and H. Monck, and not to what she claimed as representative of Lady Araminta; and the claims released by her were those which Henry Monck directed by his will to be released, which were her own, and could not

(a) 2 Ves. jun. 272 & 581.

refer to these of Lady Araminta. If the lapse of time and the enrolment of the decrees be put out of the case, that release cannot prevent Lady Araminta's representative from proceeding to prove these claims.

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As to the enrolment, the terms of the decree were of so specific a nature as not to prevent any one, who had a debt to prove, from coming in afterwards. It is not unusual to let creditors go before the Master to substantiate claims, after a long lapse of time, while any part of the fund remains in court. *Gillespie v. Alexander* (b); *Greig v. Somerville* (c); *Lashley v. Hogg* (d). We ask no more than was granted in those cases; we had a valid claim at the death of Henry Monck. These claims are not barred by time, which is to be computed from the death of Henry Monck, who by his will must be taken to have recognised every debt due from him or affecting his estates. The time that elapsed before his death cannot be taken to run against debts which he charged on his real estates.

It may be asked, why did we not take out letters of administration sooner? It is not necessary for us to account for the delay, it is enough that we are creditors whose claims are not barred by lapse of time, or presumption of satisfaction, and we have a right to proceed to establish them. But the delay is easily accounted for; Lady Araminta made the claim by her answer in 1818. Ann Monck, her executrix, in order to prove the claim, should have this evidence,—first, the settlement containing G. P. Monck's covenant in respect of the 300*l.*; secondly, his will; and thirdly, proof that timber trees had been planted by him on the estates, their value, &c. She, having resided in Bath, where Lady Araminta herself had resided and died,

(b) 3 Russ. 130.

(c) 1 Russ. & Myl. 338.

(d) 11 Ves. 602.

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was not in a situation to collect all this evidence, although she used all due diligence to procure it.

[Lord *Lyndhurst* :—The claims here made were as against an executor. A new solicitor after a lapse of years came in, and he claimed for the representative when the cause was wound up. A recognition of such claims would lead to new claims on every change of solicitors in suits, after all the proceedings in them were brought to a close.]

The House should look to the merits of this case. It cannot be inferred from the fact of Ann Monck making some claims, and omitting to make others for want of proof of them, that she intended to abandon those which she omitted. The Appellant has only recently obtained possession of the evidence necessary to support the unproved claims of Lady Araminta, and is ready to establish them, if permitted. The estates of Henry Monck are still unsold, and are amply sufficient to satisfy all the claims on them, and the Appellant does not seek to disturb in any manner the existing proceedings in the causes. We hope, therefore, that your Lordships will make an order giving him leave to go before the Master, or to take such proceedings as he may be advised to take in pursuance of the proceedings under the decree.

Mr. *Pemberton* and Mr. *Lowndes* for the Respondents :—The Appellant now asks what he did not ask by his motion in the Court from whose order he appeals. He does not now ask for leave to file a supplemental bill, but for leave to go in and prove his claims before the Master under the decree, which leave was refused by the Master of the Rolls, and which the Appellant, as appears by his notice of

motion, did not ask at all from the Lord Chancellor, from whom he asked leave only to file a supplemental bill. The Master of the Rolls refused the motion, because the person whom the Appellant represents was a party to the original cause, and ought, before the hearing of the cause, to have produced evidence of the claims alleged in her answer. No one ever heard of a party in a cause, applying for leave to go before the Master under the decree. The Appellant now asks leave to file a supplemental bill, not for the purpose of reviewing or disturbing the decree, but to establish his claims. It is not necessary to obtain leave of the Court to file a supplemental bill.

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[Lord *Lyndhurst* to Mr. *Wigram*:—Why did you not file your supplemental bill without coming to the Court for leave, claiming the benefit of the decree, and that the Court would stay proceedings on it, and the appropriation of the funds?]

[Mr. *Wigram*:—We could not venture to do so without leave of the Court.]

The Counsel for the Respondents:—The claims of the Appellant are as groundless in substance as his appeal is irregular in form. Lady Araminta Monck possessed herself of her husband's personal estate, out of which the 300*l.* and the price of the timber also, whatever it was, were payable. Both these claims were therefore annulled. They were in fact claims against herself, and were founded on a misapprehension. The arrears of her jointure, and of the annuity of 200*l.* and the legacy of 500*l.*, were claimed by her executrix with interest; the Master reported that she was entitled to them, and these sums have been paid to Ann Monck as such executrix, or to the Appellant.

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Ann Monck, in the charge filed by her in the Master's Office, expressly "released the estate of Henry Monck from any other charge, claim, or demand whatsoever that she might have thereon, save and except the several claims hereinbefore set forth." But it is suggested that the present claims were not released, that she did not know of them at the time. When Ann Monck carried in her claims on her own account and as representative of her mother, under the decree in the first cause, she and her solicitor were perfectly aware of the various demands which had been set up by her mother. Counsel had been consulted as to the possibility of maintaining them. It could not therefore have been from inadvertence that they were abandoned, nor is it so pretended by Mr. Murphy's affidavit: it is of no importance whether they were abandoned on the ground that they were unfounded, or that the party interested did not think fit to be at the trouble or expense of seeking for evidence to support them, or that she chose voluntarily to release her brother's estate from them: it is sufficient that having the sole legal and the sole beneficial interest in the subject, she did in fact abandon those claims, in the same manner as she abandoned all claims in her own right beyond those arising under the will of Henry Monck.

On the motion of the Appellant, no order could be made that would have given him any right which he has not without order, and the order, which by his motion he sought to have pronounced, would, if it operated at all, have the effect of altering a decree pronounced thirteen years ago, and enrolled upwards of eleven years ago, and not capable of being reversed or altered; and no reason is given for the delay that has taken place in making the present claims.

Mr. *Wigram*, in reply:—It is a rule that though the prayer of a bill asks only for general relief, you may afterwards ask for any specific relief; but your Lordships seem to be of opinion that on a notice of motion a party must ask specifically for the relief he wants, lest the other be taken by surprise. As there was a clear understanding on the other side of what the Appellant meant to ask, I apprehend your Lordships will observe that there is no fear of surprise.

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Lord *Brougham*:—Whatever doubts I may have of the merits of this case on the lapse of time, I have none on the form of the proceedings, the course of which is very manifest. There was, first, a motion before the Master of the Rolls for leave to go before the Master and take the benefit of the decree in the first suit, or, in the alternative, to file a supplemental bill, or for such other relief as the Court may direct, which last words I consider as nothing or, at most, as mere surplusage. The Master of the Rolls refused that motion, he did not grant leave to go before the Master or to file a supplemental bill, nor did he give the Appellant any other relief.

The next thing the Appellant did was to go before the Lord Chancellor, not with an appeal motion, which he might have made, to discharge the order of the Master of the Rolls, which would be opening the two alternatives of the former motion,—it would be a complaint that the Master of the Rolls had not given leave to go in to prove the claims before the Master in ordinary, or to file a supplemental bill,—but, instead of that, the Appellant made another and different application to the Lord Chancellor. It was only “for leave to file a supplemental bill, or for such other relief as the Court may direct.” That motion therefore was con-



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fined to an application for leave to file a supplemental bill; because I hold it to be perfectly clear that, in case of a prayer for relief appended to a specific motion or intended to be made part of the case, the notice of motion which is intended to apprise the opposite party of what is to be asked, must convey to him something more specific than the general alternative, "such other relief as the Court may direct;" and that, under that prayer, nothing can be given by the Court except what is incidental to the particularity which precedes, and is something short of the whole of that particularity, or, at all events, something *ejusdem generis*. I hold it, therefore, to be clear that under the notice of motion in this case, before the Lord Chancellor, it was not competent to his Lordship to have given leave to go in and prove the claims, that not having been asked for, but only leave to file a supplemental bill, unless,—which sometimes happened before myself in the Court of Chancery,—the other party consents, which would be consenting to the amendment of the motion in Court, and would have been, in effect, consenting to the order asked for, without notice at all. It would have amounted to a waiving of the objection that might be taken for want of notice. That is not, however, pretended to have been done in this case.

That is my opinion on this notice, which is only for leave to file a supplemental bill, taking it as if nothing had passed previously to this notice, and as if no reference had been made to what passed previously. But the case appears still stronger from the reference which is made in the notice to what passed at the Rolls. Coupled with the confining of the notice given before the Lord Chancellor to one of the alternatives, it was exceedingly calculated to mislead and to make

it be believed that, upon further consideration, the Appellant had advisedly refrained from asking both of the alternatives, which had been refused at the Rolls, and therefore had confined his application before the Lord Chancellor to one of the alternatives.

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From the order of the Lord Chancellor refusing that relief, namely, leave to file a supplemental bill, this appeal has arisen: an appeal against what? Not an appeal against the order refusing leave to go in and prove, but to file a supplemental bill; that is the shape of the case, as it would first seem to come before us; but observing that the case in that shape was not likely to be successful, and finding that it might be held that the Court of Chancery had been right in refusing leave to file a supplemental bill, as contrary to the course of proceeding, and that the decision of your Lordships might be in affirmance of that refusal of leave to file the supplemental bill, the Appellant applies now, for what? That he may have the benefit of the suit and file a bill of review, or institute a new suit after the decree has been made, which is a common case when a bill is dismissed; because if you do not get leave to file another, you are met by the plea of that decree, and therefore the Appellant wishes to avoid the difficulty by having a bill of review. He feels that he has no claim with respect to the supplemental bill, that the Court below was right in having refused to give that unnecessary leave—so unnecessary, that if this order was to be affirmed, or if it had never been appealed from, the Appellant might just as well file such a bill, and have made an application for any benefit under the suit incidental to the supplemental bill, which he might have filed, as if the Court had given him leave. In this instance, that being the case, the Appellant seems to have mended his hand,

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and to have been minded to retrace the steps, which he had taken in a wrong direction in Ireland, and instead of making the application here, for leave to file a supplemental bill, he was minded to make an application such as that which he had made before the Master of the Rolls, but not before the Lord Chancellor; namely, for leave to go in and prove the claims. That appears to have been the course which the Appellant has adopted here, but that is not a course in which we can carry him through, because the question before us is, Has or has not the Lord Chancellor in Ireland well decided in refusing leave to file a supplemental bill? And we are of opinion that his Lordship rightly refused that leave in the case before us. I do not wish to be understood, in what I have said, as by any means encouraging the Appellant to file a supplemental bill; for aught I know it is the worst thing he can do. I should rather hope that the parties may settle their differences without a suit. After a lapse of seventeen years from the death of Lady Araminta Monck it will not serve the purpose of the Appellant to say that the delay was caused by want of a personal representative. But who is the personal representative? The Rev. Henry Monck, the Appellant; he took out letters of administration in 1832; he was of age, and might have administered many years ago; the eldest son was of age in 1777; it is very likely that at that time the Appellant also was of mature age. Then why was there no representative? It will hardly do for him to explain the lapse of time, by saying there was no personal representative, for he might have been personal representative during any one of those periods, and he did not choose to make himself so. On all these grounds I have no hesitation in recommending your Lordships to affirm

the decision of the Court below, and to affirm it with costs, to be taxed.

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Lord *Lyndhurst*:—I agree with the noble and learned Lord's opinion of the irregularity of this appeal in point of form, and I recollect that Mr. Wigram, in his opening address, was extremely desirous of getting rid of the idea that the decision of the Lord Chancellor was a confirmation of the decision of the Master of the Rolls; because he thought that that might have some effect upon your Lordships' decision, and he therefore took occasion to state that the motions stood in different circumstances; but the whole scope of his subsequent argument was to show that they were the same motions, whereas they were quite different.

With respect to the merits of the case, these claims are claims in a general account. In the year 1802 the original testator died, and Henry Monck did not die until the year 1815. There were thirteen years therefore in which Lady Araminta Monck might have filed a bill for a general account; she never thought proper to do so, and therefore it is not improbable that the result of that general account would not have been advantageous to her.

I think, therefore, upon the whole, that the decision of your Lordships should be to affirm the decision of the Court below, and to affirm it with costs of the appeal.

The order of the Court below was accordingly affirmed, with costs.

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16 March.

June.

## APPEAL

FROM THE COURT OF CHANCERY.

THOMAS FOSTER, GEORGE CLEEVE, and } *Appellants.*  
 JAMES BAIKIE, Esquires - - - }

Sir CHARLES COCKERELL, Baronet - - *Respondent.*

*Incumbrances.*  
*Notice.*  
*Priority of*  
*Security.*  
*Practice.*

A second incumbrancer of an equitable interest, by giving notice of his incumbrance to the trustees in whom is vested the legal estate, obtains priority over a previous incumbrancer who has not given such notice.

Where there is an appeal against a decision of a Court of Equity, this House may consent to hear the appeal argued, but will not give judgment till the decree of the Court has been duly enrolled.

BY indentures of lease and release, 21st and 23d February 1812, George, late Duke of Marlborough, conveyed estates in Berks, Bucks, Wilts and Herts, to certain trustees named in the said indentures, in fee, upon trust to raise monies to pay off annuities before then granted by the Marquis of Blandford, and also, if they thought proper, to pay the specialty or simple contract debts of the Marquis. For these purposes, the trustees were empowered to sell the estates, or in the meantime mortgage them, and to re-purchase the annuities; and, if the trustees should think proper, but not otherwise, to pay the debts of the Marquis, and pay any ultimate surplus of money raised in the life-time of the late Duke to his Grace, and the surplus of money raised after the late Duke's death to the Marquis; and it was declared that the trustees

should stand seised of the estates unsold in trust for the late Duke for life, and after his decease, in trust for the Marquis in fee.

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By indenture of the 13th August 1812, the trusts were enlarged, and the trustees were empowered to raise money to pay interest of debts, at the time of the date of the release of February 1812, due and owing by the Marquis of Blandford, and also the premiums of insurance on policies effected on his life, for the better securing of such debts. The trustees were also authorised to raise money upon annuities, in order to carry the objects of the deed into effect, and, subject to such trusts, to pay the surplus of monies raised in the life-time of the late Duke to him, and the surplus of monies raised after his decease to the Marquis. This deed also declared the trustees to stand seised of the estates unsold for the late Duke for life, and after his decease, in trust for the Marquis in fee; and it was declared that the trustees might exercise partially or wholly the trusts for paying the debts of the Marquis, at their discretion.

By indentures of the 8th, 12th and 14th June 1813, the Marquis granted to the Appellant, Thomas Foster, an annuity of 447 *l.*; to the Appellant, George Cleeve, an annuity of 750 *l.*; and to William Walter, since deceased, and now represented by James Baikie, an annuity of 775 *l.* By another indenture of the 14th June 1813, made between the Marquis of Blandford of the first part, Thomas Foster of the second part, George Cleeve of the third part, William Walter of the fourth part, and Edward Howard, as trustee, of the fifth part, after reciting the indentures of the 21st and 22d of February, the 13th of August 1812, and the grants of annuity of the 8th, 12th and 14th of June 1813, the Marquis

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granted to Foster, Cleeve and Walter, powers of distress and entry upon the estates comprised in the indentures of 21st and 22d February 1812, for securing their annuities ; and he demised the same estates to Howard, as trustee, for 500 years, for better securing those annuities. The Appellants' annuities were further secured by warrants of attorney, on which judgments were entered as of Michaelmas Term, 1813, and docketed on the 19th of November 1813. Memorials of the four last-stated indentures, by which the three last-mentioned annuities were granted, and of the warrants of attorney securing the same, were duly enrolled on the 28th and 30th days of June 1813.

By an indenture, dated the 10th day of November 1814, and made between the Marquis of Blandford of the one part, and the Respondent, Sir Charles Cockerell, of the other part, after reciting the said indentures of lease and release of the 21st and 22d February 1812, the Marquis of Blandford conveyed, in consideration of a sum of 20,000 *l.*, to the said Respondent, his heirs, &c., all the manors, messuages, tithes, hereditaments, monies and premises to which the Marquis was then entitled, under the trusts of the said indenture of the 22d of February 1812, with their appurtenances, and all his estate and interest therein, to hold, receive and take the same to the use of the Respondent, his heirs, &c., according to the nature and quality thereof respectively, in as beneficial a manner as the Marquis of Blandford could or might have held and enjoyed the same if the said indenture had not been executed, subject to a proviso for redemption therein contained.

The late Duke of Marlborough departed this life on the 30th of January 1817, and the Marquis of Blandford succeeded to the title. In March 1819, the Re-

spondent caused notice in writing of the indenture of the 10th of November 1814, and of the Respondent's claims under the same, to be given to the trustees under the previous deeds.

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The trustees, in pursuance of the trusts of the deeds of the 21st and 22d of February 1812, sold the manor of Oakley, in the county of Bucks, part of the estates comprised in the indentures, and received the purchase-money thereof, in the life-time of the late Duke, and they disposed of the purchase-money under the trusts vested in them.

After the death of the late Duke, the trustees sold the other estate in the said county of Bucks, called the Shabbington estate, and also the estates in the counties of Herts and Wilts.

The White Knights estate, in the county of Berks, was also contracted to be sold under the direction of the Court of Chancery; but before the sale was completed, the estate was recovered from the trustees by a party claiming a prior title thereto (*a*).

The trustees had a surplus of the purchase-moneys, arising from the sales of parts of the estates in Bucks and Wilts, and they invested parts thereof in Exchequer-bills, which they deposited in the hands of their bankers, Messrs. Coutts & Co.

The annuities granted to the Appellants having become greatly in arrear, they filed their bill in the Court of Chancery, as of Michaelmas Term, 1824, against the trustees, the Respondent, and certain other persons, whereby, after stating the grants of the annuities to them, and the deeds creating and securing the same, and stating that the trustees had sold some part of the estates comprised in the said indentures of 21st and 22d of February 1812, in the life-time of the late Duke, and had sold the residue thereof subse-

(*a*) See *Cockerell v. Cholmeley*, *ante*, Vol. i. p. 60.



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quently to his death, and that the trustees had satisfied all the trusts preceding the ultimate trust for the payment of the surplus of the trust-monies, it went on to allege, that after satisfying such trusts, the clear surplus of the trust-monies amounted to a very considerable sum, which they had retained in their hands; the bill therefore prayed, that an account might be taken of the estates and hereditaments comprised in the indentures of lease and release of the 21st and 22d of February 1812, and of the rents and purchase-money thereof, received by the trustees, or by any person by their order, or for their use, or which, without their wilful neglect or default, they might have received; and that an account might be taken of the sums paid under the trusts of the indentures, and an account of what was due to the Appellants, respectively, for the arrears of their respective annuities; and that the amount of such arrears might be paid to them respectively, out of the monies which, upon the taking of the account, should be found due from the trustees, and that a sufficient part of the trust-monies might be set apart to meet the future payments of the annuities.

The defendants put in their answer, and the Respondent specially stated, in his answer, his claims under the indenture of the 10th of November 1814, and the notice of such claims given to the trustees in March 1819, and his ignorance of the agreements of the 8th, 12th and 14th of June 1813, or of those annuities or any others being secured upon the estates comprised in the indentures of 1812.

The cause was heard before the Master of the Rolls on the 18th of February 1830, and by the decree made by his Honor, bearing date upon that day, it was referred to the Master to take the accounts prayed by the Bill, and also to take an account of what was due for principal money on the several charges on the

estates comprised in the said indentures, distinguishing what was due on each; and to inquire as to the dates of the several and respective charges and incumbrances, and the sums for which the same were given, and the particular premises subject thereto respectively, and the priorities of the respective charges with regard to each other; and further directions were reserved.

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The Master, by his general report, dated on the 24th of December 1832, after stating the accounts, and the notice of the Respondent's incumbrances given by the Respondent to the trustees, found that the Appellants were entitled to a priority of claim over the Respondent, in respect of the annuities secured on the estates comprised in the deed of February 1812.

The Respondent took exceptions to this report, and on argument before the Master of the Rolls (*b*), his Honor held that, by reason of the notice given to the trustees, the Respondent was entitled to a priority over the Appellants in respect of the rights secured to him by the indenture of the 10th of November 1814; he therefore made an order allowing the exception.

The present was an appeal against that order.

Mr. *Treslove* and Mr. *Tinney* for the Appellants:—  
 The equities of the parties here are equal, and there is no ground on which the Respondent can claim a priority over the previous incumbrancers. It is clear that the Respondent, having made no inquiry for incumbrances of the trustees before he took the security, and having given no notice of that security until nearly five years after its date, could not have sustained any injury by the omission of the Appellants to give earlier notice to the trustees of the security which they possessed. Their omission there-

(*b*) 1 Myl. & Keen, 297.

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fore does not give him any title to priority in equity. That brings back the question of priority to that of the date of the instruments, and then the case is clearly in favour of the Appellants. The priority of date here gives priority of right. It was held to do so in *Small v. Oudley* (c), which was a case of an assignment of part of a stock in trade in favour of a particular creditor, that assignment being only made on the day before the party committed an act of bankruptcy; and the mere want of notice has been distinctly decided not to affect the rights of an incumbrancer prior in point of time. In *Tourville v. Naish* (d), Lord Chancellor Talbot held that where the thing assigned is only a chose in action, though the assignment be without notice, yet as no legal estate passes, the first assignment has priority over others. The principle to be deduced from all the cases where a second has been allowed to take priority over a first incumbrancer, amounts to this, that he shall do so only where there is such negligence on the part of the first incumbrancer as amounts to a fraud, *Evans v. Bicknell* (e), *Jones v. Gibbons* (f), *Cooper v. Fynmore* (g), or such as brings the other party into grievous difficulties.—[Lord Lyndhurst (Lord Chancellor): Does not the omission to give notice in such cases, always enable a party to commit a fraud?—It may or may not do so, but the bare possibility that such a consequence may arise from the omission to give notice, will not of itself defeat the right of a first incumbrancer; nor will the earlier notice of a second incumbrancer have that effect unless there has been a culpable negligence on the part of the first; there has been no such negligence

(c) 2 P. Wms. 427.

(d) 3 P. Wms. 306.

(e) 6 Ves. 183.

(f) 9 Ves. 407.

(g) 3 Russ. 60.

here, and as the Respondent took the security without making any inquiry, it is clear that if the Appellant had given notice, the Respondent would not have been in any better situation on that account, for he did not take the trouble to ask whether any previous incumbrance existed. The case of *Ryall v. Rowles* (*h*), will of course be relied on by the other side. That was a case in bankruptcy, and the expressions used in some of the judgments there are too general. The reports of Mr. Justice Burnett's judgment in *Vesey* and in *Atkins*, are different from that which was left by that learned Judge himself, and which is to be found in *Lincoln's-Inn Library* (*i*). That report makes Mr. Justice Burnett say, "Having considered the case of mortgagees of goods, I shall next consider the case of assignments of a share in trade which consists partly of things in action and partly of things in possession; and I shall first consider the three mortgages of a seventh share of the bankrupt's moiety in trade, to three strangers," (for in *Ryall v. Rowles*, there were several mortgagees of the stock in trade, utensils, debts and profits); "and then I shall consider his assignment of the whole moiety to one in trust for his partner. But before I go into the consideration of this matter, I beg leave shortly to consider the case of a mere chose in action, and the simplest is, that of a bond which is not assignable at law, but which is certainly assignable in equity. And why? but because the assignor can furnish his assignee with the means of reducing it into possession by giving him authority to sue in his name, and putting the bond into his hands to prove the debt. Why, therefore, is not the delivery of these means of reducing a chose in

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(*h*) 1 Ves. sen. 348; S. C. 1 Atk. 165.

(*i*) Hill's Collection, 11 B. fol. 315.

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action into possession, as requisite upon such an assignment, as the delivery of the thing on the conveyance of a thing in possession?"—[Lord *Lyndhurst* (Lord Chancellor): So far that corresponds exactly with the report.]—It does, but we now come to another part. "Suppose then, a trader assigns over a bond debt, and the assignee permits the assignor to continue in possession of the bond, why is not this within the words and intent of the statute? The assignment is a conveyance of it in equity." That is what the Appellants contend in the present case.

The assignment is a complete conveyance, and the right of the assignee is perfect as against another incumbrancer, though, as in *Ryall v. Rowles*, it may not be perfect as against the assignees of a bankrupt. Again, Mr. Justice Burnett said, "A share in trade may be a chose in action, which can only pass by assignment, as was the case in *Small v. Oudley*, 2 P. Wms. 427, which was held good, though made but the day before the assignor became bankrupt. But that was the assignment of a share in another man's trade, which the assignor himself was not in possession of, consequently could deliver no possession of, nor could continue in possession after assignment." This latter distinction applies precisely to the present case. The right assigned to the Appellants was a bare right, not a thing in possession; the assignor was not in possession of it himself, and consequently could neither, in the words of Mr. Justice Burnett, continue in possession of it, nor deliver possession to another person. So far, therefore, as that case touches the present, it is in favour of the Appellants, but is a case depending altogether on the statutes of bankruptcy, and is not therefore a direct authority on the point. After that case there was no other on the same point

till the case of *Wright v. Lord Dorchester* occurred before Lord Eldon. That case was never deemed important enough to find its way into the reports. It is first mentioned in argument in *Loveridge v. Cooper* (*k*), and is commented on in the judgment in that case. *Wright v. Lord Dorchester* was there treated as a case of little authority, and in fact it was not more than a conditional decision of the cause; for after dissolving the injunction to restrain payment of some money, Lord Eldon required the party in whose favour he had done so to give bond to return the money, in case the decree should finally be made against him. The next case is that of *Cooper v. Fynmore* (*l*). There it was distinctly laid down, that in order to deprive the first incumbrancer of his priority, it was necessary that there should be such laches as in a court of equity amounted to fraud, and that mere neglect of notice was not sufficient to postpone him. That case was decided in 1814, and then came the cases of *Dearle v. Hall* (*m*), and *Loveridge v. Cooper* (*n*). In the latter of these cases Lord Lyndhurst said (*o*), "Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person who in fact is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, &c.; in *Ryall v. Rowles* it is expressly applied to bonds, simple contract debts, and other choses in action. It is true that *Ryall v. Rowles* was a case in bankruptcy, but the Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker,

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(*k*) 3 Russ. 49 n.

(*l*) Id. 60.

(*m*) Id. 1.

(*n*) Id. 30.

(*o*) Id. 58.

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and Mr. Justice Burnett, so that the principle on which the Court there acted must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Mr. Justice Burnett, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application." His Lordship then went on to observe on what was said by Chief Baron Parker as to notice; but it is remarkable that nothing is said in that case by Mr. Justice Burnett on that subject. The observations of the Chief Baron, therefore, must have been uncalled for by the argument or the case, and cannot have great weight attached to them. The authorities, therefore, only go to this extent, that the negligence to give a second incumbrancer priority, must be such as to enable one party to commit a fraud or to bring another into grievous difficulties.—[Lord *Lyndhurst*: If there is not notice duly given, a man would be enabled to commit a fraud. If the first party gave notice, the second would be on his guard, and the mischief now arising would be prevented.]—But mere negligence is not tantamount to actual mischief. All the generality of expression in *Ryall v. Rowles*, referred to by Lord Lyndhurst, in *Loveridge v. Cooper*, is not sufficient to carry the doctrine in that case to such an extent. The subsequent incumbrancer, in order to set aside the priority of date, and obtain for himself a priority of equity, must do more than give notice; he must get in the legal estate, *Stanhope v. Verney* (p). That doctrine was distinctly laid down in *Brace v. The Duchess of Marlborough* (q), where it is said, "If

(p) 2 Eden, 81; Co. Litt. 290; Butler's note, 249.

(q) 2 P. Wms. 491.

a third mortgagee buys in the first mortgage, though it be pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice Hale called a plank gained by the third mortgagee, or *tabula in naufragio*." In *Willoughby v. Willoughby* (r), Lord Hardwicke refers to the doctrine of Lord Cowper in *Wilker v. Bodington* (s), where it was held that where a man is a purchaser for a valuable consideration without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better right to call for that legal estate than his adversary; and adopting that doctrine, he says, that "the legal estate must be so standing out, as that the puisne incumbrancer has not acquired the better or preferable right to call for that legal estate." It is clear that he cannot acquire such right by mere notice to the holders of the legal estate that he is an incumbrancer. This rule was fully adopted by Lord Eldon, in *Maundrell v. Maundrell* (t), where he said, "With respect to mortgagees and incumbrancers, if they do not get in the term in some sense, either by taking an assignment or making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect them." Nothing of that sort was done here, and the only priority between the parties is, that of the date of their incumbrances. In *Frere v. Moore* (u) the plaintiff became the mortgagee of a prebend, the legal estate in such prebend being in a trustee, and in the mortgage the trustee covenanted to stand possessed, subject

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(r) 1 T. R. 768.

(t) 10 Ves. 264.

(s) 2 Vern. 599.

(u) 8 Price, 475.



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to a prior mortgage, for securing to the plaintiff payment of the sum there stated, and subject thereto to the use of such persons as the mortgagor should appoint. The mortgagor afterwards appointed the trustee to stand possessed for other persons. The second mortgagee had notice of the first mortgage. None of the mortgagees got in the legal estate. It was held, that as they had all equal equities, the incumbrances were available only according to the priorities of their several dates, and that the covenant as to the first mortgagee to stand possessed could not be held equivalent to an assignment, or to a getting in of the legal estate, which, however, either of the mortgagees might have done, and thus obtained a priority. In this state the law remained till the decision of the case of *Cooper v. Fynmore* (x), by which the matter was for the first time definitively settled. Now that case expressly decided that mere neglect of notice was not sufficient to postpone a prior incumbrancer, but that to produce that effect, there must be such laches as would amount to fraud.—[Lord *Lyndhurst*: The cases of *Dearle v. Hall* and *Cooper v. Fynmore* are certainly at variance with each other, for the inquiry as to prior incumbrances was made in both of those cases; one of them, therefore, must be taken as overruling the other.]—Not precisely so, for in *Dearle v. Hall* Sir T. Plumer will be found throughout relying upon the delay in the two first incumbrancers to give notice to the trustees as having occasioned a great practical mischief to Hall, who had used every possible means to acquire a full knowledge of the property and the title to it (y); that case therefore, in substance, supports the doctrine now contended for. No such objection arises here, and the delay of the Respondent has

(x) 3 Russ. 60.

(y) Id. 15.

been as great, and as likely to produce mischief, as that of which the Appellants are accused. There are four modes by which the assignee of an interest of this kind can completely protect himself; first, by getting in the legal estate for himself; secondly, by procuring an express declaration of the trustee that he holds as trustee for the assignee; thirdly, by making the trustee a party to the deed of assignment; and fourthly, by getting possession of the deed itself, and so defeating the purchaser at law or getting an advantage from him of which equity will not then deprive the assignee.—[Lord *Lyndhurst*: Suppose the party signs a bond, and the assignee procures it to be delivered; will he, from holding the bond, be entitled to priority?—He will.—[Lord *Lyndhurst*: And is not a notice the same thing in effect?—It is not; *Wilker v. Bodington* (z). There must be something beyond the mere custody of the deeds to give a subsequent incumbrancer an advantage over one prior in date. In *Stanhope v. Lord Verney* (a), that rule was acted on. Lord Chancellor Northington there said, “I am of opinion that I cannot, consistently with the rules and maxims of this Court, or without taking lands *ex commercio*, relieve the plaintiffs, for no man can purchase lands but by advice of counsel, and if you cannot safely purchase with the legal estate, counsel cannot advise you, and you cannot purchase at all.” He therefore held, that not the custody of deeds alone, but the custody of deeds creating a term, accompanied by a declaration of the trust of it in favour of a second incumbrancer, without notice of the prior mortgage, gave him an advantage over the prior incumbrancer,

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(z) 2 Vern. 599.

(a) 2 Eden, 81; Co. Litt. 290 b. (note 249) sect. xv.

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of which a court of equity would not deprive him. There he required the two circumstances to be united in one person in order to give this advantage. In the case of an equitable interest in land, the date of the security decides the question of priority, except there be fraud in the transaction, *Beckett v. Cordley* (b). This decision of Lord Thurlow has been repeatedly mentioned with great respect by Lord Eldon (c). All the cases, therefore, show that to defeat the priority of date in equitable incumbrances, there must on the one side be fraud or on the other a possession of the legal estate. To act upon a different rule, and to allow, on the mere ground of notice, a superiority to a subsequent equitable incumbrancer, where the law would not give him any superiority of legal rights, would be to destroy the settled practice of the courts, and to introduce a new course of proceeding, in contradiction to all the authorities. There is no pretence for charging fraud here as against the Appellants, nor is there any ground for saying that the Respondent obtained possession of the legal estate, and so entitled himself to a priority over a more early incumbrancer.

Mr. *Pemberton* and Mr. *Cockerell* for the Respondent:—It is unnecessary to go into any consideration of the cases previous to those of *Dearle v. Hall*, and *Loveridge v. Cooper*, for in them the law was fully considered and settled. The principles adopted in those cases must be acted upon in the present. It is not denied that the general rule in equity is, that he who is first in time is first in equity. The argument on the other side proceeds altogether on the pre-

(b) 1 Bro. Ch. Cas. 353.

(c) Ex parte *Cawthorne*, 1 Glyn & J. 243; *Evans v. Bicknell*, Ves. 192; and *Martinez v. Cooper*, 2 Russ. 214.

sumption, that there is an analogy between real estate and a chose in action. That argument is completely destroyed by the authority of *Ryall v. Rowles*. A chose in action cannot pass by assignment, which gives no right *in rem* till, by notice to the trustees, the validity of that assignment is perfected, or till delivery has been made. Taking that to be the rule, who had the first perfect title in this case? The Respondent; for it was he that first gave notice to the trustee. The rule as to priority is, in fact, therefore in his favour. There is no ground of merit on which one party is preferred to another; he does that which is necessary to perfect his own title, and to prevent any fraud towards those who may come after him. The Respondent is said to have been guilty of laches. That accusation more properly applies to the Appellants, who did not give any notice to the trustees till after it had been given by the Respondent; and the latter gave it as soon as it was found that there was any person in whose hands the money could be attached. The Respondent here has not only the authority of Sir T. Plumer, in *Dearle v. Hall*, and *Loveridge v. Cooper*, and that of Lord Lyndhurst, who confirmed the decision in those cases, but that of the Court of Exchequer, in *Hulton v. Sandys* (d). In that case an annuity was secured by a charge on certain stocks standing in the name of trustees, and on an assignment of the dividends of the stock, but the grantee omitted to give notice to the trustees; the grantee of an annuity subsequently created was in consequence preferred to him. Nothing was said in that case of anything except the want of notice, it being distinctly held, that notice to the trustees was

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(d) 1 Younge, 602.

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necessary to perfect the title of the assignee of a chose in action. That case alone, therefore, is decisive of the question.—[Lord *Lyndhurst*: In the case in the Exchequer this point was merely mentioned; it was not argued.]—It was merely mentioned, and the parties at once acquiesced in it, which is a strong confirmation of the opinion of the profession as to its correctness. The rule clearly is, that they who first give notice are first in point of time, and, therefore, have priority in equity. There have been several recent cases in which the doctrine in *Dearle v. Hall* and *Loveridge v. Cooper* has been recognised. In *Williams v. Thorpe* (e) it was held that the assignment of a policy of insurance on a life would not take it out of the order and disposition of the assignor, if no notice of the assignment was given to the insurers; and in *Ex parte Colwill* (f) it was decided that an assignment of a policy without notice to the office would not prevent the operation of the clause of reputed ownership; and it has been held that the payment of the annual premium by the agent of the assignee, who in the course of conversation with one of the clerks in the office told him that the policy had been assigned, did not amount to notice. It is clear, therefore, not merely that notice is required, but that the notice should be distinct and unequivocal. Again, in *Greasing v. Beckford* (g), A. was entitled to a reversionary interest in a fund in court, and assigned it first to B. and afterwards to C. An order was obtained by C. and entered at the Accountant-general's Office, directing that the fund should not be transferred without notice to him, and it was held that this gave him a priority over B., who had not taken similar precautions. The principle, therefore, on which the

(e) 2 Sim. 257.

(f) Mont. 110.

(g) 5 Sim. 195.

courts have hitherto acted is clear, and this case has been decided in the court below upon that principle. There is no question as to comparative negligence; the party who omits to give notice, omits to complete his title; when he gives notice, he makes his title complete, and the person whose title is first complete, is the person to be considered as the prior incumbrancer. This is, and always has been, the acknowledged doctrine of courts of equity, and their decisions have always proceeded on this principle. Unless this appeal is dismissed, the regular course of decisions will be quite altered, and a new rule, dangerous in itself and inconvenient to all parties, will be introduced.

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Mr. *Treslove*, in reply:—The argument on the other side is put on the single point, that to perfect the assignment of a chose in action notice is necessary. But that is not warranted by any direct authority. The case of *Ryall v. Rowles* does not go to that extent, and large as may be the expressions of some of the Judges there, or of Sir T. Plumer, in *Dearle v. Hall*, and *Loveridge v. Cooper*, they do not establish such a doctrine. *Ryall v. Rowles* can only properly be applied to a case of bankruptcy. What the Respondent has done here may give him a better title, as against an incumbrancer subsequent to himself, but can give him no priority as against an incumbrance of an earlier date. That was the view which even the Master of the Rolls took of the present case when it was before him. He said (*h*), “A better equity is, where a second incumbrancer, without notice, takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take: thus a declaration of

(*h*) 1 Myl. & K. 306.

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trust of an outstanding term, accompanied by delivery of the deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer." That shows that if giving notice is like taking possession, it is a taking of possession against a subsequent, not a prior incumbrancer. The judgment of the Master of the Rolls in this case was, therefore, founded on the analogy between an assignment of an interest like this and an assignment of real property; yet the argument on the other side proceeds altogether on the denial of such an analogy. The doctrine now contended for, that a title under an equitable assignment cannot be perfect without notice, was not that of Sir T. Jekyll, of Lord Hardwicke, or of Lord Eldon, and ought not to be now, for the first time, introduced into the law by the decision of this House.

Lord *Lyndhurst* inquired if the decree of the Court below was enrolled.

The solicitor for the Appellants answered that it was not.

The cases of *Barton v. Bateman* (i), and *Conyngham v. Conyngham* (k), were referred to, in both of which it was said that no appeal would lie to the Lords till the decree had been enrolled (l).

Lord *Lyndhurst* (Chancellor):—We will pronounce judgment when the decree has been enrolled.

June 22.

Lord *Lyndhurst*, in moving for judgment, said:—This is a case which was argued some time since, and

(i) 2 Bro. P. C. 275.

(k) Ambl. 91. S. C. Dick. 145.

(l) But see *Moore v. Blake*, 4 Dow. 239, where after argument before Lords Eldon and Redesdale, "it appeared that the decree below had not been made up, and the judgment was delayed till the defect should be rectified."

on which your Lordships had pretty well made up your minds at the time of the argument. It appeared, however, that the decree of the Court below had not been enrolled, and judgment was therefore postponed. The parties have since enrolled the decree, and the cause is now in such a situation that your Lordships may proceed to give judgment upon it.

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The question in the cause was one of the right of priority, as between two incumbrancers, namely, whether the subsequent incumbrancer in equity, having given notice to the trustees, was entitled to priority over a former equitable incumbrancer. That question seems to me to have been settled, after much deliberate discussion, in two cases: in the case of *Dearle v. Hall*, and in the case of *Loveridge v. Cooper*. These cases were very learnedly and carefully argued before Sir Thomas Plumer, as Master of the Rolls. The Master of the Rolls, after taking time to consider them, pronounced, in each, a very elaborate judgment, in which he most distinctly recognised the principle, that a party who first gives notice to the trustees of an incumbrance created in his favour over the trust property, is entitled to a priority in equity. Without adverting to the particular facts of those cases, the reason on which his Honor adopted that principle as the rule for his decision seems to have been, that if a contrary doctrine was allowed to prevail, it would enable a *cestui que trust* to commit a fraud, by enabling him to assign his interest, first to one, and then to a second incumbrancer, and perhaps, indeed, to a great many more; and these later incumbrancers would have no opportunity of ascertaining, by any communication with the trustees, whether or not there had been a prior assignment of



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the interest, on the security of which they were relying for provision for their claims.

Another principle, acted upon by the Master of the Rolls, was, that a party, till he gave notice to the trustees, had not done everything that was necessary to complete his title. I fully agree with that principle. In a case of this sort it is necessary that a party claiming advantage from a title, should do everything that is requisite to complete that title before he sets up a claim in respect of it. The Master of the Rolls was also of opinion, that the trustees themselves were entitled to notice on their own account; and, that till notice was given to the trustees, they did not, in fact, become trustees for the assignee. It was upon these distinct grounds that he laid it down as a general principle, that in the case of an equitable assignment the party who was the earlier incumbrancer in point of date, was not entitled to priority if he did not give notice; but such priority was justly to be conceded to a party giving notice to the trustees, although such party was, according to the date of the assignment, only a second incumbrancer.

These cases afterwards came before me when I had the honour of presiding in the Court of Chancery, and they were again argued with great ability and great attention to the subject. I took time to consider the judgment, and after mature deliberation felt satisfied that the decision of the Master of the Rolls in each case was a correct judgment, and that it was my duty to affirm the judgment in each. We come, then, to the present case, and in my opinion the principle on which the decisions in those cases proceeded applies directly to the present. Here are two incumbrancers of an equitable interest. The latter

gave notice to the trustees, the former neglected to do so till long afterwards. This case came before the late Master of the Rolls (Sir John Leach). His Honor referred to and considered the decisions I have just noticed, and being of opinion that they were correct and that he was bound by their authority, he pronounced his own judgment in conformity with them, and gave to the second incumbrancer with notice a priority over the first incumbrancer without notice. Under these circumstances, therefore, I think your Lordships will be of opinion that that decision so pronounced upon these principles was correct, and I therefore move that the judgment in this case be affirmed; and considering that the point now subjected to appeal has already been decided more than once, after deliberate argument in the Court below, I think that your Lordships will also be of opinion that this judgment ought to be affirmed with costs.

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Lord *Brougham*, I agree with my noble and learned friend as to this case. This case was decided in the Court below, upon the principle of the two former cases in the Rolls, and the discussion here has brought under the view of your Lordships the judgments in *Dearle v. Hall* and *Loveridge v. Cooper*. With the decisions in those cases I perfectly agree, and it is not only my opinion that this case ought to be decided by them, because the principle laid down in those to which I have referred strictly applies to this case, and because there is nothing in the facts of the present case to prevent the application of that principle, but also because I am of opinion, that if those cases of *Dearle v. Hall* and *Loveridge v. Cooper* were now before your Lord-

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ships by appeal, they ought to be declared to have been well decided, and ought to be affirmed. It seems to me that the true principle which ought to govern courts of equity was taken in those cases, according not only to the analogy of established decisions, but according to the rules which have been formally and distinctly laid down, and which make those cases not cases of the first impression, but cases which have proceeded upon well-defined and well-settled rules of equity. I entirely agree that this judgment of the Master of the Rolls should be affirmed, and that there was no such reasonable ground for appeal here as to entitle the Appellant to escape without paying the costs.

Decree affirmed, and appeal dismissed with costs.

## A P P E A L

FROM THE COURT OF CHANCERY IN IRELAND.

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July 30, 31.  
Aug. 1.The Right Hon. the Earl of BANDON - *Appellant.*HENRY BECHER, Esq. - - - - - *Respondent.*

Though the Court of Chancery cannot review or correct a decree of the Court of Exchequer, yet where such decree has been obtained collusively and fraudulently, a party whose interests are affected by it, may raise, in the Court of Chancery, either as actor or defender, a question as to its validity.

*Decree.*  
*Jurisdiction.*  
*Fraud*  
*Limitations.*

Where sales of estates had fraudulently taken place under decrees of the Court of Exchequer in Ireland, obtained by collusion between the tenant for life, the mortgagee, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been protected in such suits, the Court of Chancery in Ireland, on his coming into possession, granted him relief on a bill filed to redeem. That decree was affirmed by the Lords.

The fraudulent sales had been made by the first tenant for life; his son died in his lifetime; the tenancy for life continued to exist for above 35 years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem. HELD by the Court below, and affirmed by the Lords, that he was not barred by the lapse of time.

HENRY BECHER, formerly of Creagh, in the county of Cork, Esq., being seised in fee of certain lands in that county, executed a mortgage, dated 14th October 1737, whereby he granted and released unto Samuel Townsend, his heirs and assigns, all those the lands of Killeenleagh, Lassanaroe, Cappamore and Cahergall,

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situate in the barony of West Carberry and county of Cork ; subject to redemption on payment of the sum of 1,000 £., with interest.

Henry Becher being entitled to the equity of redemption of these mortgaged premises, and being seised in fee of several other lands, &c., died in 1738, leaving John Becher (Respondent's great grandfather) his eldest son and heir-at-law, who thereupon entered into possession of the said hereditaments, subject, as to said lands of Lassanaroe, amongst others, to the said mortgage for 1,000 £. Previous to John Becher's marriage with Miss Frances Hedges, by certain indentures of lease and release of 26th and 27th March 1740, the release made between himself of the first part, Richard Hedges and said Frances Hedges of the second part, the Honourable Charles Annesley and Samuel Townsend of the third part, and Richard Tonson and Richard Eyre of the fourth part, John Becher, in consideration of his intended marriage and of 5,600 £., the marriage portion, conveyed unto Annesley and Townsend, and their heirs, certain lands in the county of Cork, among which were some known by the names of Ardentenant, Balteenoughtra, Ballyourane, Barnitonicane, Caherolickenny, Mauldenny, Derrynalamane, Dunkelly, Keelbronoge, Lassanaroe, Rathcool, Ratourah, Letterscanlan, &c., upon trust as to part of said lands, to the use of John Becher, until the marriage, then upon other trusts for limited purposes, then to the use of John Becher for life, and then to trustees, to preserve contingent remainders. A jointure of 500 £. a-year was secured to Frances Hedges, and a term for ninety-nine years was vested in trustees, and, subject thereto, the lands were conveyed to the use of the first and other sons of the said John Becher by said Frances Hedges successively in tail male. In

default of issue, the ultimate remainder in fee was to revert to John Becher. The term of ninety-nine years was declared to be vested in the trustees, to raise by sale or mortgage 5,000 *l.* for younger children, in such shares as John Becher should appoint.

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The marriage between the said John Becher and Frances Hedges took place, and the issue thereof were two sons and two daughters, viz. Richard Becher, the eldest son, and who was grandfather of Respondent; Michael Becher, the second son; Jane Becher, afterwards the wife of Daniel O'Donovan; and Elizabeth Becher, afterwards the wife of William Evans.

By a settlement on the marriage of Daniel O'Donovan and Jane Becher, dated on the 2d of April 1763, John Becher, pursuant to the power in the settlement of 27th March 1740, appointed 2,000 *l.*, part of the 5,000 *l.*, to Jane Becher, to bear interest from 2d April 1763, at 5 *l.* per cent. An assignment thereof was made to trustees, upon trust to pay the interest to O'Donovan for his life, and after his death to pay over the principal for the younger children of the marriage, in such shares and at such times as Daniel O'Donovan should appoint. It was further declared that the principal sum should not be raised out of the real estates of John Becher during his life.

Richard Becher, seised of an estate in tail male, expectant on the death of his father, attained 21 in 1768; and his father having occasion to borrow 2,300 *l.*, applied to Richard Wright for the purpose, and having obtained from him a loan to that amount, the father and son, on the 18th January 1768, joined in a mortgage in fee to Richard Wright for 2,300 *l.* The mortgage extended over the lands comprised in the settlement of 27th March 1740. There was also a covenant by John and Richard Becher to suffer

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a recovery to the use of Richard Wright, these securities being subject to redemption on payment of principal and interest. The recovery was to enure, after the payment of the mortgage-money, to such uses as John and Richard Becher should by deed appoint; and in default of, and until such appointment, to the uses of the settlement of 26th and 27th March 1740. A recovery, as of Easter Term 1768, was suffered accordingly. On the 17th September 1768, a deed, declaring further uses of the recovery, was executed, and the uses were declared to be to John Becher for life, to Richard Becher for life, to trustees to preserve, &c., with a power in Richard Becher to jointure, and then to the first and other sons of the said Richard Becher successively in tail male. There was a proviso that any mortgage or judgment obtained previous to the execution of the deed was not to be affected thereby.

On the 9th September 1769, a settlement was made on the marriage of Richard Becher with Letitia Hungerford, by which John and Richard Becher conveyed to trustees the lands comprised in the settlement of 1740, and in the deeds of 18th January and 17th September 1768, to hold to the use of John Becher for life, to Richard Becher for life, to trustees to preserve, &c., and (subject to a jointure of 300 *l.* per annum for Letitia Hungerford, and also to a term of 500 years for a provision of 5,000 *l.* for younger children) to the first and other sons of the said Richard Becher successively in tail male; and in default of such issue to John and Richard Becher, according to their respective estates therein at the time of executing said deed. The deed of 9th September 1769 revoked the uses of the deed of 17th September 1768. The issue of the marriage of Richard Becher with Letitia Hungerford were John Becher, Respondent's father, the eldest son; Henry Becher and Frances Becher, younger children. The

two latter became entitled to 5,000 *l.* as their portion under the marriage settlement of their parents.

John Becher, Respondent's great grandfather, married, 2dly, Barbara Townsend; and, 3dly, Barbara Hungerford; and on the 28th October 1769 made his will, by which he appointed, under the powers of the settlement of 27th March 1740, 2,000 *l.*, part of 3,000 *l.* (remainder of 5,000 *l.*) to his daughter Elizabeth, and 1,000 *l.* to his second son, Michael Becher. John Becher died on 19th February 1778, leaving his widow, his first and second sons, and his two daughters surviving. His will was proved by the Respondent's grandfather.

Michael Becher died in November 1778, having, by his will dated 7th April 1778, bequeathed unto his brother, Richard Becher, his share of the sum of 5,000 *l.*, and appointed him executor.

Daniel O'Donovan died in 1778, and by his will, dated 22d December 1777, appointed the 2,000 *l.* to his younger children, equally to be divided between them share and share alike.

Richard Becher (Respondent's grandfather) having survived his wife Letitia, married Mary Alleyn, and by deed, dated 25th August 1779, after reciting the settlement of the 27th March 1740, and the will of Michael Becher, Richard Becher, for the considerations therein mentioned, did grant and make over unto Dean French and Richard Boyle Townsend, the trustees, the said sum of 1,000 *l.*, upon trust that they should raise the same and pay it over to the sons or daughters of him the said Richard Becher and Mary Alleyn. Two sons and seven daughters were the issue of this marriage.

The 1,000 *l.* so due on the foot of the deed of mortgage of the 14th of October 1737, became, and is now,

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vested in the Respondent's uncle, Henry Becher, and is a subsisting incumbrance, upon which the Respondent continues to pay interest. The lands of Lassanaroe, included in this mortgage, were sold to James Bernard for payment of a subsequent charge, as if this incumbrance did not exist.

The 1,000*l.* appointed by John Becher the elder for his son Michael, is a subsisting charge upon the estates, and is vested in the surviving trustee named in said settlement of 25th August 1779, and the Respondent pays interest for the same.

Henry Becher and Frances Becher, now Hungerford, who were born previously to 1777, and were the only younger children of Richard Becher and Letitia his wife, became, under the provisions of the settlement of 9th September 1769, entitled to the 5,000*l.* in equal shares. They are now living.

Elizabeth Becher intermarried with William Evans, of Kilkeran, in the county of Cork, esquire, on 2d September 1777.

After the decease of John Becher the elder, and upon the commencement of the term of 99 years, William Evans and Elizabeth his wife, exhibited their bill on the equity side of the Exchequer in Ireland, on 9th February 1779, against Richard Becher, and against his sons John and Henry, both then minors, (but omitting their sister Frances, though born some years before,) and against the surviving trustees of the respective terms of 99 years and 500 years for raising the portions of the younger children of Richard Becher and Letitia his wife, and also against Richard and John Townsend, the trustees named in the deeds of 17th September 1768, and 9th September 1769; and the bill (amongst other things) set forth the settlement of March 1740, and the limitations of said term of 99 years, and the trusts thereof;

and that the marriage took effect, and that there was issue thereof Richard Becher, Respondent's grandfather, Michael, Jean and Elizabeth; and also stating the settlement of the 9th September 1769 on the marriage of said Richard Becher with Letitia Hungerford, and the said trust-term thereby created for securing the 5,000*l.* as a provision for the younger children of the marriage; and that there was issue of that marriage John Becher and Henry Becher; and the bill prayed that Richard Becher might be decreed to pay the 2,000*l.* (part of the 5,000*l.* to be raised under the settlement of 1740, and referred to in the will of John Becher made in October 1769), with interest at 5*l.* per cent., until the death of John Becher the elder, and also with legal interest from the death of the said John Becher to William Evans and Elizabeth his wife, at a short day, or, in default thereof, that the said premises, being those comprised in the said respective deeds of 27th March 1740, 18th January 1768, and 9th September 1769, or a competent part thereof, might be set up and sold for the remainder of the trust-term of 99 years, for the payment of plaintiffs' demand, and that a receiver might be appointed.

Richard Becher, on 3d February 1780, answered the said bill.

The defendants, the trustees of the two terms, also filed answers to said bill; and Richard Becher, on 9th November 1781, filed a further answer in the cause; and John Becher and Henry Becher, (Respondent's father and uncle), being then infants, on 21st March 1782 (by John Macartney, esq., the Deputy Remembrancer of the Court of Exchequer,) filed their answers to said bill, and thereby stated they were total strangers to the charges and allegations therein mentioned.

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Issue having been joined in this cause, witnesses were examined on the part of the plaintiffs only; and the cause having been set down to be heard, it was, on 1st June 1782, ordered that it should be referred to the Remembrancer to state an account of what was due to the plaintiffs for principal and interest under the deed of settlement of 27th March 1740, and the will of John Becher, calculating the interest at the rate of 5*l.* per cent. per annum, to the time of the death of the said John Becher, and at the rate of 6*l.* per cent. per annum from thence to the day of pronouncing the decree. The Chief Remembrancer, or his deputy, having proceeded to take the account, by his report, dated 8th November 1782, found that the plaintiffs had filed their charge, but that no discharge was filed thereto, nor was there any attendance on behalf of any of the defendants; and that there was due to the plaintiffs for principal and interest up to 19th June 1782, 2,566*l.* 6*s.* 5*d.* The cause having been set down for further directions, was heard on 16th November 1782; when it was ordered, that the officer of the Court of Exchequer should then, in open court, tot up the interest on the said principal sum of 2,000*l.* from the said 19th June (being the time interest was computed to in said report) up to the 15th November then next instant, being the time of confirming the said report; and the same having been calculated, the whole was found to amount to 2,615*l.* 5*s.* 8*d.* And it was further ordered, that Richard Becher, the defendant in the cause, should pay unto the plaintiffs, within six calendar months from 16th November 1782, the said last-mentioned sum, with interest from the date of the last decree until paid, together with costs; or, in default thereof, that the Chief Remembrancer should sell by public cant, to the highest and fairest bidder, a competent

part of the lands and premises comprised in the trust-term of 99 years; and that out of the money arising by such sale he was to pay unto the plaintiffs their principal, interest and costs; and the remainder, if any, he was to pay over to the defendant Richard Becher, upon his making out a good title to such person as should be declared the purchaser of such lands and premises.

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The decree was duly enrolled, and was signed by Stawell Webb, since deceased, as attorney for the plaintiffs; by Robert Reeves, as attorney for the defendants John Becher, Henry Becher, and the trustees; and by Benjamin Swayne, as attorney for Robert Hedges; but no attorney or person signed the same on behalf of the defendant Richard Becher.

On the 9th of June 1781 another bill was exhibited on the equity side of the Court of Exchequer, in the name of Richard Wright, the mortgagee, against Richard Becher, Respondent's grandfather, and Barbara his wife, and against John Becher, his eldest son, the father of Respondent, then a minor, and Henry Becher, the second son of the said Richard Becher, also a minor, and against two of the trustees; and the bill was afterwards amended. It stated the mortgage-deed of 18th January 1768, for securing 2,300*l.*; an endorsement thereon, dated 25th March 1768, acknowledging the receipt by John Becher the elder of an additional sum of 700*l.* from Wright; the settlement of the 9th September 1769, and the limitations thereby made as to estates so settled; and after further stating that the principal sum of 2,300*l.*, and the said 700*l.*, with considerable arrears of interest, were due, it prayed that the officer of the Court should tot up what should appear to be due to Wright for principal,

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interest and costs, and that the defendants in the cause might be decreed to pay the same to the plaintiff, by a short day, to be appointed by the said Court, and in default thereof, that the defendants Richard Becher and John Becher, and all other persons claiming under the said John Becher deceased, and under the said defendant Richard Becher, or either of them, might be foreclosed, and that the mortgaged premises might be sold.

Richard Becher answered the bill for himself and for his infant son John Becher, on the 9th November 1781; but all the other defendants, including Henry Becher, the infant brother of John Becher, were struck out as parties, and were not named parties in the title of the decree; and the cause having been set down for hearing, it was, on the 21st February 1782, heard, and referred to the Chief Remembrancer to state an account of what was due to Wright for principal, interest, and costs. This decree cannot be found among the records of the Court of Exchequer.

The Chief Remembrancer made his report, finding 3,583*l.* 2*s.* 7½*d.* to be due, and this report was confirmed; and Richard Becher and John, his son, were ordered, within six months from the 8th of May 1782, to pay the same with costs, or, in default of payment, the Chief Remembrancer was ordered to sell by public cant, to the highest bidder, the several lands and premises comprised in the deeds of 27th March 1740 and 9th September 1769 mentioned, or a competent part thereof; and that out of the money arising from such sale, he was, in the first place, to pay the plaintiff his principal, interest and costs, and the remainder, if any, he was to pay over unto the defendants, or unto such of them as should appear entitled thereto, upon their making out a good title to such person as should become the purchaser of the said

lands and premises. This decree was signed on behalf of the said plaintiff by Thomas Barter, as his attorney, and on behalf of the said Richard Becher and John Becher by John Denis, as their attorney.

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John O'Donovan, Jane O'Donovan, and Helen O'Donovan, minors, by Jane O'Donovan, their mother and next friend, on the 12th March 1785, likewise exhibited their bill in the Exchequer against Richard Becher (Respondent's grandfather), and against John Becher (Respondent's father) and Henry Becher, who were both minors, and against the trustees, and after stating the deed of the 27th March 1740 and the indenture of 2d April 1763, made upon the marriage of the said Daniel O'Donovan with Jane Becher, and the will of O'Donovan, and also the deed of 9th September 1769, prayed that Richard Becher might pay the 2,000*l.*, with interest thereon, or, in default thereof, that the lands comprised in the said trust-term might be sold for the remainder of the term of ninety-nine years, and that the plaintiffs should be paid their demand out of the produce of such sale.

Answers were put in by all the defendants, except Richard Becher, as to whom the bill was ordered to be taken as confessed, and it was decreed that the plaintiffs were entitled to 2,000*l.*, with interest; and a reference, to take an account of the sum due, was directed.

The Deputy Remembrancer made his report, stating that no person had attended him on behalf of the defendants; that he found 2,480*l.* 18*s.* 2*d.* to be due, and a similar decree was then made in this as in the other causes. Stowell Webb signed this decree as attorney for the plaintiffs.

Four separate sales were effected under the decrees in the said three causes.

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At the first sale, on the 17th of May 1783, Thomas Brown, John O'Malley and John Terry Morgan were the bidders for the several sums of 5,000 *l.*, 5,500 *l.* and 6,450 *l.*, as the purchase money of the thirteen denominations of land formerly mentioned; Morgan was declared the purchaser. On the 20th of May 1783, being only three days after this sale, a consent was entered into, in the cause of Wright *v.* Becher, as follows, viz.: "By consent of the parties, plaintiff and defendants, in this cause, testified by their attornies signing hercof, as also of John Terry Morgan, esq., the purchaser on the last sale in this cause, it is hereby agreed that the said sale be and is hereby set aside, and that the said lands and premises shall be again advertised, and set up by the officer for sale on Monday the 2d day of June next; and that this consent may be received and made the order of this court. Dated this 20th day of May 1783. (Signed) Thomas Barter, attorney for the plaintiff; John Dennis, attorney for the defendants; John Terry Morgan."

This consent was made a rule of Court, by order dated 2d June 1783, and under this rule of Court of 2d June 1783, the second sale was had.

At this second sale, which took place on the day of the date of the order (viz. 2d June 1783), the same lands sold to Morgan at the first sale were again put up, together with two other denominations.

The sale was kept open for a long time, and on 20th June 1783, John Terry Morgan made a bidding of 7,000 *l.*; and on 3d July 1783 he was declared purchaser; the persons bidding against him for some of the lands being William Honnor, John Milward, and John Dennis. John Becher, the Respondent's father, died on the 21st February 1820, leaving Richard Becher, the Respondent's grandfather, still

living, and tenant for life of the estates to which the Respondent was entitled in tail male under the settlement of 1769. The Respondent was also entitled to the equity of redemption of the mortgaged estates. Richard Becher, the Respondent's grandfather, died on the 8th of February 1825.

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The Respondent filed his bill in the Court of Chancery on the 1st of May 1828 against the Appellant and others, stating all the circumstances already set forth, and alleging that Richard Becher (Respondent's grandfather) was a person of very extravagant habits, and was often in pecuniary difficulties; that James Bernard, at the time of the Exchequer decrees, was a banker, having great command of money; that a close intimacy existed between Richard Becher and James Bernard; that James Bernard well knew Richard Becher's pecuniary difficulties and his property; and that James Bernard, by sales improperly conducted, under these decrees got possession of thirteen denominations of the lands thus ordered to be sold.

There were allegations in the Respondent's bill that some or all of these parties were mere instruments in the hands of the persons then affecting to prosecute the suits, and to compel the sale of the estates; that the tenant for life joined in these proceedings, and fraudulently assisted in a sale in which the interests of those in remainder were totally disregarded, and that the whole proceeding was therefore tainted with fraud and could not be supported. Many circumstances were stated as showing that James Bernard was a party to this fraud on the rights of the remainder-man; such, for instance, as that there were several sales, at different times, of various portions of the property, the sales being set aside by consents entered into by the parties themselves; that there were no real bidders at these sales,



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but only the attornies or the clerks of the attornies employed for the parties or for James Bernard; that the sales were excessive, being sales of property far greater in amount than would have been required to satisfy the judgments in the suits in which the sales were directed; that promissory notes were ordered to be taken in lieu of money, by the consent of the solicitors; that these consents were permitted by the Court, though the tenant in tail was an infant; that the 7,000*l.*, the produce of the second sale, was applied by fraudulent consents to the benefit of the tenant for life alone. It was also alleged, that after the second sale, in June 1783, there was a surplus of 1,800*l.* beyond the charges; that the lands sold to James Bernard were conveyed by the tenant for life to him in fee, but that the tenant in tail was no party to the conveyance; that there was a further sale of lands for 1,800*l.*, and a conveyance to James Bernard in fee of the said lands; that the tenant for life and mortgagee were the only parties thereto, and that James Bernard entered into possession of all the lands, but did not pay the 1,800*l.*, nor any rent or interest, and had possession delivered to him by consent. On the 13th February 1784, James Bernard, on the marriage of his son, Francis Bernard, afterwards created Earl of Bandon, settled the lands thus purchased on his son in strict settlement; but James Bernard did not rest satisfied with his title to the estates thus acquired; and on the 14th May 1785, another consent was entered into to set aside the last sale and have another. It was further alleged, that only two months before the last consent, Webb filed O'Donovan's bill to exhaust the 1,800*l.* purchase money in the hands of James Bernard; that Honner appeared as attorney for the purchaser when the matter was brought before the Court; that this sale was also set aside, but costs, by consent, were

not given to the infant. On the 11th June 1785, the third sale of part of the same lands in *Wright v. Becher* took place, when the bidders thereat were Fitzgerald, Ormsby, and Webb, the last of whom was declared purchaser for 4,192*l.* 18*s.*, and proof was given of an alleged concert between Webb and James Bernard, and the amount for which the property was pretended to be sold, was exactly the amount of the debt alleged to be due to Evans and his wife; that some of the conveyances were of the fee, though only terms for years were sold; and that in one case the conveyance was only executed by the pretended plaintiff in the suit, and not even by the tenant for life, and certainly not by the tenant in tail or by any one on his behalf.

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The bill prayed that the several decrees of the Court of Exchequer might be declared to have been fraudulently obtained; that the several sales had pursuant thereto, and the conveyances made to James Bernard in 1783, if in existence, might also be declared fraudulent, but might stand as securities for the sums paid by James Bernard, or Francis Earl of Bandon, in discharge of incumbrances; that an account might be taken of the sums paid by them on foot of the mortgage, and in satisfaction of the trusts of the term of 99 years; and that an account might be taken of the rents, and any surplus payment of the sums due at foot of the various securities be paid to the Respondent; that Respondent might be at liberty to redeem the mortgaged premises upon payment of the said money; and that, upon payment thereof, said Earl of Bandon might be decreed to deliver up the premises to Respondent, with the deeds relating thereto; that if the lands could not be restored to Respondent by reason of the deed of 13th February 1784, then that Respon-

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dent might be compensated out of the assets of James Bernard; and that a receiver might be appointed.

Answers were put in, and the cause came to a hearing, when a reference was ordered to the Master to report the sums paid by James Bernard on account of incumbrances; the Appellant to have credit for such sums, with interest, as were unliquidated at the death of the tenant for life; and James Bernard was declared bound to keep down the interest on the charges, as Richard Becher, the tenant for life, would have been. Reference was also made to the Master as to whether the profits of the lands were sufficient to keep down the interest on said incumbrances in the lifetime of Richard Becher; and, if not sufficient, to report the balance of the interest due. The Respondent was declared entitled in fee-tail, with the immediate reversion in fee-simple, to the lands comprised in the settlement of 1784, subject only to the sums paid by James Bernard; and in case the rents and profits of the whole of the said lands should be inadequate, the Master was directed to inquire as to what proportion the lands of Letterscanlan and Ratourah ought to contribute. The Respondent was decreed entitled to the full value of lands bound by the settlement, to be paid out of the assets of said James Bernard, and a reference was directed to take an account of the personal estate of James Bernard. Directions were given as to the application of the rents, and as to other matters, and certain issues were directed, and costs and further directions were reserved. There was a petition by the Appellant for re-hearing, alleging length of time as a bar to the claim of the Respondent, and that no relief ought to have been granted against the assets of James Bernard, or of Francis, Earl of

Bandon. The cause was reheard, and the original decree affirmed.

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Mr. *Tinney* and Mr. *Pemberton* for the Appellant:—  
This decree cannot be supported. In the first place, the suit is in substance a bill for a rehearing by the Court of Chancery of a case already decided in the Court of Exchequer. Such a proceeding cannot be allowed, under whatever form it may come into a Court. The party, now a plaintiff in the Court of Chancery, is the tenant in tail of an estate which, while in the possession of a preceding tenant in tail, through whom he claims, was the subject of a suit in the Court of Exchequer and of a decree made by that Court. In that suit the former tenant in tail and a mortgagee were parties. The decree made in that suit must be binding on the present tenant in tail. The case of *Giffard v. Hort* (a) shows that a decree against a tenant for life or a tenant in tail will bind him in remainder; for treating such decree as one so binding on him, the House of Lords gave the remainder-man the right to file a supplemental bill, in order to enable him to appeal against it. If he has this advantage, he must take the corresponding disability, and be held bound, where he does not appeal. He has not done so here, but in another Court; and with a view to impeach the whole proceedings in the former suit he has filed the present bill. Such a course cannot be permitted him. The next answer to the bill is, that even if the plaintiff has a right in this way to impeach the former proceedings, he can only do it on the ground of fraud. Now under-value would be a ground of fraud. But it is not pretended that these estates were purchased at an under-value; on the contrary,

(a) 1 Sch. & Lef. 386.

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all the evidence goes to show that full value was given for them, and the Lord Chancellor himself, in his judgment in the Court below, admits that the parties engaged in these transactions were not guilty of any moral fraud, but he says that they set up a series of sham sales. Even if that is so, the blame is with the seller, under whom the Respondent claims, and not with the purchaser, now represented by the Appellant. The purchaser therefore cannot be made answerable: *Lloyd v. Johnes* (b). Again, this is in substance a suit for damages. Who is the party injured? Not the Respondent, but his father, John Becher. Yet he never attempted to sue for damages or to set aside the transaction. But even if damages are to be paid, none can be assessed, for full value was given for the estates. Besides, a court of equity cannot give damages, nor, in a case like the present, can it decree the reconveyance of the estate. Even therefore if the Respondent had established any title to set aside the proceedings in the Court of Exchequer, he could gain nothing by so doing. But he has no right to set them aside. The sales cannot be impeached but on the ground of fraud, and fraud is not proved here; nothing short of fraud, will be sufficient to affect a purchaser under a decree. In *Bennett v. Hamill* (c) it was held that a purchaser under a decree shall not be affected by error in the decree, as for example, in its not having given a day to an infant defendant to show cause, or in decreeing a sale of lands to satisfy judgment debts without an account of the personal estate. In like manner Lord Thurlow decided, in *Wall v. Bushby* (d), that infants are bound by a decree taken by consent, though there has been no reference to the Master to inquire whether it was for

(b) 9 Ves. 37.

(c) 2 Sch. & Lef. 566.

(d) 1 Bro. C. C. 484.

their benefit. Then too the lapse of time is alone sufficient in this case to be a bar to the Respondent's right to a decree. In *Burke v. Crosbie* (e), it was held that a conveyance to a *bonâ fide* purchaser, under a decree against a feme covert for a sale of part of her separate estate, cannot, after an acquiescence of twenty-two years, be set aside, notwithstanding the purchase-money may have been misapplied. Length of time was there distinctly declared to be a bar to an equitable title. Nor would the Court set aside a sale under a decree though the surplus of the purchase-money was directed to be paid to the tenant for life, *Lightbourne v. Swift* (f); and that case also decided that a minor is bound by a decree (g); *Cholmeley v. Clinton* (h) distinctly established that adverse possession of an equity of redemption for 20 years, is a bar to any other claim of the equity of redemption, producing the same effect as abatement, intrusion, and disseisin, with respect to the legal estate. The doctrine now contended for, that a remainder-man is bound by the act of a tenant for life through whom he claims, was referred to by Lord Plunkett, with the observation that he found it laid down broadly enough in the text books, but that he could not find the grounds of it distinctly stated. Yet the cases of *Cuthbert v. Creasy* (i), *Pim v. Goodwin* (k), and *Foster v. Blake* (l), are sufficient authorities on this point, and the judgment of Lord Mannors in the last of these cases has always been considered to be good law. In *Whalley v. Whalley*, the distinction which will be attempted to be relied on in this case, as to the continuance of the

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(e) 1 Ball & Beat. 489.

(f) 2 Ball & Beat. 207.

(g) Id. 213.

(h) 4 Bli. 1.

(i) 4 Bli. 135.

(k) Id. 133.

(l) Id. 140; 4 Dow, 230. nom.

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tenancy for life until 1825, and the consequent absence of right in the remainder-man to interfere, was considered, and was held not to be an answer to the lapse of time. There it was held that the cause of action, within the meaning of the Statute of Limitations, arises when a party has a right to apply to a Court of Equity, and in that case, which, it should be recollected, was a case of fraud, it was held that the time of limitation began to run from the time when the fraud was discovered, whether in the life of the ancestor or upon the descent. That rule must be applied here, and then the Respondent will be barred by lapse of time. There is no authority whatever to justify the claim of this remainder-man after so great a lapse of time. Even therefore, if any of the other grounds of objection should be deemed insufficient, and it is submitted that all of them are valid, this alone justifies the Appellant in praying that the judgment of the Court below may be reversed.

Mr. *Bickersteth* and Mr. *Jacob* for the Respondents:—All the proceedings in the Court of Exchequer were wrong. There was no protection afforded to the interests of the infants; as against them the proceedings were fraudulent, and a court of equity, when it discovers fraud against infants, will relieve them from the consequences. The sale was directed without any restriction as to what was to be sold; if more was sold than was necessary, the surplus was to go into the pocket of the tenant for life. That is treated on the other side as a sort of equitable conversion not sufficient to vitiate the transaction, and *Lightburne v. Swift* (*m*) is cited; but in that case all the necessary parties were before the Court, and that circumstance

(*m*) 2 Ball & B. 207.

was a main ingredient in the decision. The relations existing here between all the parties concerned in the sale, and the manner in which the lands not sold were treated, clearly prove that the whole transaction was collusive and fraudulent. There was nothing real or *bonâ fide* in it; the parties deceived the Court by pretended consents, under colour of which they sacrificed the interests of the tenants in remainder. Then when the first sale was set aside and another was resorted to, the order for the second sale was made without any direction as to the payment of the costs of the first. Again, therefore, the interests of the tenant in remainder were sacrificed, and Mr. Bernard, who pretended to have parted with the estate, acted in the case, and consented that the sale should be set aside and the proceedings under it vacated. It is not disputed that the subsequent proceedings were fictitious; the opinion of the other side as to the anterior proceedings is pretty well shown by their having recourse afterwards to others not now denied to be fictitious. It is clear, under all the circumstances of this case, that the sales in 1783 were collusive and fraudulent; that they were without any real competition among the buyers, and without protection to the interests of the infant tenant in tail. Even the ordinary clause that he should have a day to show cause when he came of age was omitted from the decree. Under these sales the only interest that James Bernard could gain was an assignment of a mortgage and of the life interest of Richard Becher, and he acquired no rights as against John Becher the tenant in tail, or as against the remainder-man. The only persons protected in the Court of Exchequer were those who were capable of acting for themselves, namely, the mortgagee, the owner of the charge paid off, and the tenant for life. Their interest passed to the purchaser, but

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no other did so. The Court was deluded, by the contrivances of these parties, into making decrees and orders which are completely irregular. It is asserted that full value was given for these estates. There is no evidence of that; all that the Court can now know is, that proper means were not taken to procure the full value for the estates. As to the objection with respect to the mode of awarding compensation, the bill in this case seeks to recover the lands. Bernard, who had wrongfully obtained these lands, gave them to his own family, but his wrongful act could confer no right on the donees. The Respondents are not bound to show that they suffered an actual loss from the sale, that must be presumed, as the sale was not an equitable conversion, but a collusive and fraudulent proceeding. But an objection of form is made to this suit. It is said that these were judgments of the Court of Exchequer, and that there was consequently no power in the Court of Chancery to set them aside. That position cannot be maintained with respect to judgments obtained, as these were, by fraud.—[Lord Brougham: You cannot, under ordinary circumstances, go to the Chancery to set aside a decree of the Exchequer for irregularity or error, but the decree being set up in Chancery, you have a right, on the ground of fraud, to call on the Court to disregard that decree.]—That is the ground on which the Respondent puts the present case. The Irish Chancery reports show many cases in which decrees of sales have been set aside as fraudulent; sometimes in the Courts in which such decrees were made, and sometimes in other Courts. In *Kennedy v. Daly* (n), there was a sale in the Exchequer, and a suit was subsequently instituted in Chancery; that was a case of fraud upon the rights of

(n) 1 Sch. & Lef. 355-379.

an infant. Lord Redesdale gave relief against the sale, and commented strongly on the fraudulent nature of the proceeding. In *Giffard v. Hort* (o), which was a case of a similar kind, Lord Redesdale acted on the same principle, and declared that he should hold that the plaintiff was entitled to be put in the same situation he would have been in if the fraud had not been practised. In *Gore v. Stackpoole* (p), there was a sale of mortgaged estates for the payment of the mortgage and of judgment debts. The sale was effected under a decree fraudulently obtained in 1733, in the Court of Exchequer in Ireland, by collusion between the tenant for life and others, to the prejudice of those in remainder. This sale was questioned in the Irish Court of Chancery in 1796 by the tenant in tail, three months after his title accrued. There Lord Clare, in 1801, dismissed the bill, but that decision was afterwards brought under consideration in the House of Lords, and the sale was, in 1813, set aside by the Lords as to part sold to a person cognizant of the fraud; and Lord Redesdale expressed strong doubts whether the same course would not have been pursued with respect to the other part, if the case had come before their Lordships, as to that other part, though it had been sold to a person not actually cognizant of the fraud, but who might have discovered it by inspecting the proceedings, on the face of which it was apparent. In *Mullins v. Townsend* (q), and *Colclough v. Bolger* (r), the principle of setting aside a fraudulent sale was acted on. In the last of these cases the Court set aside a sale without going into the question of fraud, and this House decided that it was rightly done, on the ground that

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(o) 1 Sch. & Lef. 386.

(q) 2 Dow & Clark, 430; 5  
Bli. N. S. 567.

(p) 1 Dow, 18.

(r) 4 Dow, 54; 3 Bli. 181.

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it was incumbent on a purchaser to see that the decree under which he purchased was substantially complied with. That was not done here, and on that ground alone the first sale could not have been supported. It was bad also on the ground on which the parties themselves deemed it prudent to set it aside.

Now as to the question of compensation. The principle of courts of equity is to give relief by a specific restitution of the property; but if that is impossible, then the party injured is entitled to the value of the property at the time he ought to have come into possession of it. If the Court of Chancery is called on to give a man the value of stock, of all things the most fluctuating, the order is to replace the quantity of stock improperly sold; and the stock must be replaced without reference to the difference in price. *Wilson v. Moore*, which occurred some months ago in the Court of Chancery (s), proceeded on that rule; and trustees having improperly applied trust stock to their own purposes, were afterwards ordered, at the suit of the legatees, to restore it, and it was replaced, not at the value it bore at the time of the conversion, but at a very considerable advance. Then as to the answer set up on the alleged delay. The rule as to the lapse of time is not denied, but the question here is as to the applicability of that rule. The first point to be considered is, whether there was fraud in the transaction, and if so, then when that fraud was discovered; the next point is, when the adverse possession commenced, and when the right to sue accrued. The existing right to the possession of the land could alone give the Respondent the right to sue. Courts of equity will not entertain a bill for the mere declaration of a right, nor unless something is to be done upon that declaration.

(s) Since reported, 1 Myl. & K. 127 & 337.

On that ground alone, the Respondent is excused for not proceeding at an earlier period. Then as to the adverse possession. If a mortgagee enters into possession as mortgagee during the life of the tenant for life, and remains in possession for twenty years, the tenant in remainder is barred, for such a possession is adverse ; but if the mortgagee purchases the interest of the tenant for life, or takes under him, the mortgagee is in possession in two characters, and his possession is not adverse, but is consistent with the interest of him in remainder. In *Corbett v. Baker* (t), the husband and wife were in possession of an estate in right of the wife, they mortgaged by fine, and then conveyed the equity of redemption by lease and release to the mortgagee. He remained in possession as complete owner for more than twenty years during the life of the husband, who was tenant by courtesy. After the husband's death it was held that the heir of the wife was not barred of his equity of redemption by lapse of time. *Ravald v. Russel* (u), in the Exchequer, is to the same effect. In the last of these cases, *Harris v. Hollinson* (x), *Cholmeley v. Clinton* (y), and *Corbett v. Baker*, were cited and considered ; and Lord Chief Baron Alexander, admitting that adverse possession would be a bar, declared that the question whether the possession was or was not adverse, must depend on the character in which the possession was held. Tried by that rule, there was no adverse possession in the present case, when the mortgagee was in under the tenant for life, for Lord Chief Baron Alexander distinctly stated that the character of the tenant for life is not adverse to him in remainder. *Whalley v. Whalley* (z) is no authority in the present case, for that

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(t) 3 Anstr. 755.

(u) 1 Younge, 9.

(x) 1 Sim. & St. 471.

(y) 2 Jac. & W. 191 ; 4 Bli. 1.

(z) 3 Bli. 2.

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was an application by a party to set aside deeds which he himself had executed. It was clear that in such a case the limitation of time began from the moment that the fraud was discovered. But *Bennett v. Colley*(a) is a direct authority. There, upon the expiration of the tenancy for life, the first remainder-man was allowed to claim compensation for a loss he had suffered through the neglect of the tenant for life, though more than twenty years had elapsed. In the present case the discovery of the fraud would have given the remainder-man no right to proceed during the existence of the tenancy for life. The utmost that he could have done under any circumstances, would have been to file a bill to perpetuate testimony. But even if he could have been allowed to do that, which would have been of comparatively little use, since the documentary evidence was sufficient for any purpose he might require, he could not have applied to the Court for relief while the tenancy for life continued. As soon as it terminated he proceeded. There has not, therefore, been any acquiescence on the part of the Respondent, and he is entitled to have the judgment given in his favour, affirmed with costs.

Mr. *Tinney* in reply:—In all the cases where a transaction taking place a considerable time back has been set aside, there is not one in which the main ingredient was not a want of value given by the purchaser. There is no such ingredient in the present case. The Respondent here had no right to apply to the Court of Chancery to set aside transactions which had taken place many years ago in the Court of Exchequer. The Court of Chancery is no court of appeal to decide on judgments previously given in the Court of Exchequer. Both are courts of co-ordinate

(a) 5 Sim. 181; 2 Myl. & K. 225.

jurisdiction. The distinction on which the proceeding has been attempted to be justified does not apply. The Respondent, in fact, appealed to the Court of Chancery to set aside the judgment of the Court of Exchequer, a court of co-ordinate jurisdiction in equity. Now it is admitted on the other side that this cannot be done. On that admission the judgment of the Court below must be reversed. The ground on which these sales are impeached is one of fraud, but there is no evidence whatever to impute fraud to Mr. Bernard. The fact that, under the recommendation of his professional advisers, he agreed to the sale being set aside proves nothing. If they thought that there was any defect of form that might render the title doubtful for a moment, they were right in having the defect remedied while all the parties were alive. Their doing so at so early a period is rather a proof of good faith than otherwise. But supposing that those who now represent Mr. Bernard should be compelled to give what is called compensation, in what manner is that compensation to be ascertained? The difficulty of settling that point is an answer to this suit. It is said that if the property is not restored, the value must be given, and that that value must be calculated at the time when the remainder-man would, but for these transactions, have been entitled to enter into possession. But will equity, because this land has been passed away to a stranger, who has altered and improved the character of the property, now call on his representatives to pay the present, the improved value of the land? It is impossible to suppose that a court of equity will do anything of the kind. *Wilson v. Moore* (b) is not in point, for that was a case arising out of the stipulations made on a marriage, and fraudulently endeavoured to be evaded. In such

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(b) 1 Myl. & Keene, 127.

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cases the Courts have always strictly enforced the stipulation (c). Here marriage was not the consideration, and no fraud is proved. But there is another difficulty: suppose that there existed a ground for compensation, to whom is it to be given? The Respondent is not the personal representative of his father, but is a sort of purchaser under the provisions of the statute *De donis* from the original creator of the estate tail. Now, pecuniary damages must always go to the personal representative. Not to act on that rule would create numberless difficulties. Suppose the Respondent should die before the money passed into his pocket, could the remainder-man in tail under the settlement of 1740 come into Court, and by a supplemental bill claim this money? He certainly could not; nor can the present Respondent claim it as remainder-man, after the expiration of his father's title. Now, as to the lapse of time. The Respondent is barred by lapse of time. The general principle in *Cholmeley v. Clinton* and the other cases is, that from the moment a party is enabled to have relief in equity, his acquiescence runs against him.—[Lord Brougham: That is, provided that the possession of the other party is inconsistent with his rights; in other words, that it is an adverse possession.]—Not an adverse possession in the sense in which that term is ordinarily used in a court of law.—[Lord Brougham: A possession not referable to anything which is consistent with his title; he could not be said to slumber over his rights, if his utmost activity could do nothing for him.]—Suppose that definition of adverse possession to be adopted in this case. Is the possession consistent with his title? Wright was the mortgagee of the whole estate included in the settlement of 1790. Evans was an incum-

(c) *Jones v. Martin*, 6 Bro. P. C. 437; *Logan v. Winklet*, ante, vol. i. p. 611.

brancer on it. Wright obtained a decree for a foreclosure, which then went on to direct that, the equities of Evans being destroyed, the whole estate should be sold, in order to clear off incumbrances. Was not the whole title affected by this proceeding? The possession by any one person of any particular lot is inconsistent with a mortgage which runs over the whole. From the moment, therefore, that a purchaser of a part existed, and was let into possession on his purchase, there was a possession inconsistent with that of the remainder-man, and the time of limitation began to run. Bernard here did not purchase Richard Becher's life estate under Richard Becher, but under a decree adverse to Richard Becher. Bernard, therefore, does not claim under Becher, but against him. His possession, consequently, was adverse to the tenant for life, and to those in remainder, from the moment that it vested in Bernard. The point now under discussion was argued when *Foster v. Blake* was the second time before the Court, and the observations of the learned Judge who decided that case are important, as showing what was his opinion as to the course that courts of equity ought to adopt with regard to the provisions of the Statute of Limitations in cases of bills for redeeming filed by those in remainder. He said (*d*), "The only question now remaining, is how far the Statute of Limitations is to be applied to a redemption bill. It appears not a little extraordinary that a court of equity should adopt the analogy and the exceptions of the statute, and yet reject the provisions as to the period from which the time is calculated to commence, so as to bar the redemption bill. The mortgagor in equity is considered as the owner of this estate, the mortgagee a mere incumbrancer; the limitation of a bill to redeem is borrowed from the statute, and no

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(*d*) 2 Ball & B. 575.



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satisfactory reason can be assigned for rejecting the most important provision of the act, namely, the period from which the adverse possession shall begin to run as against a remainder-man." The observations of the Lord Chancellor in *Bennett v. Colley* (e), show that the Respondent in this case is barred. His Lordship, after referring to the many cases that had been cited, declared that they did not apply, because in that case "the quantum of damages could not be ascertained till the tenant for life died, because till then it was impossible to know what would be the residue unexpended of the lease, and the present proceeding could not have been instituted." No such excuse for the delay exists in the present case. The Respondent had a clear and well-defined remedy, which he might have put in force at an earlier period. His laches in not doing so must now debar him from succeeding in this suit. It is a matter of every-day practice, that when a mortgagee takes possession, the time begins to run against the remainder-man, as he has the same right to redeem as the tenant for life. *Ravald v. Russell* (f) was identical with the case of *Corbet v. Barker* (g); and there the possession of the mortgagee was perfectly consistent with the possession of the husband, who was tenant by the courtesy, and the heir of the wife could not interfere. These two cases, therefore, furnish no authority in support of the Respondent's claim, for the possession here was adverse. In *Colclough v. Stevens* (h), the heir had been abroad, and therefore the statute did not apply; and in *Gore v. Stackpoole* (i), the tenant for life was himself the real though not the avowed purchaser of the fee, so that of course

(e) 2 Myl. & K. 225-233.

(h) 1 Bli. 121.

(f) Younge, 9.

(i) 1 Dow, 18.

(g) 1 Anstr. 138. S. C. judgment reversed, 3 Anstr. 755.

the Statute of Limitations could not run against the heir during his life, for that would have been to render his wrongful act good as against the tenant in remainder.

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Lord *Brougham*:—This case has been very fully and ably argued, and the point involved is one of considerable importance. When a decree is pronounced by a Judge of the long experience of the noble and learned Lord who decided this case, and after ample discussion and great pains taken by him, and when his judgment is fortified by a statement of reasons ample and satisfactory (at least in all except with respect to one particular), it becomes an anxious matter for any one to advise your Lordships to overrule his decision. The probabilities are all in favour of the soundness of his judgment; it is, however, the duty of the professional members of your Lordships' House to advise your Lordships to the best of their abilities, on all cases which may be brought here by appeal for your decision. I shall, therefore, apply myself to the consideration with that view; but though there are one or two matters on which I shall not be satisfied till I have had time to consider them, there are others on which I shall now throw out a few observations that will, perhaps, dispose of them at once. The first ground of objection assigned appears to be one of form, but in fact it is one of substance, for it goes to the jurisdiction. It is said that the whole of these proceedings spring from a decree of the Court of Exchequer in Ireland, and that that decree being pronounced by a Court of competent jurisdiction, upon parties legally before it, cannot now be questioned in another Court of co-ordinate jurisdiction; but, if brought into dispute at all, should be brought into dispute in the Court where it was

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originally pronounced. I agree generally to the proposition, but I must add to it this one qualification, that you may at all times, in a Court of competent jurisdiction,—competent as to the subject-matter of the suit itself,—where you appear as an actor, object to a decree made in another Court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit; or if pronounced in a real and substantial suit, between parties who were really not in contest with each other. That it is undeniably true that the Court of Chancery has no right to review a decree of the Court of Exchequer; that nothing but a Court of Appeal can give redress if such decree is erroneous, is clear, and indeed nothing can be more true than such a proposition; but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defence of a right. These two propositions are undeniably true; they are recognised in practice, they are independent of each other, and they stand well together. That was the rule stated as deduced from all the authorities in a case which, having been decided in the Court of Arches, was subsequently the subject of discussion in another Court. The question was, whether the judgment of the Court of Arches was conclusive and binding on all other Courts, not Courts where that judgment was before them on appeal. Mr. Solicitor-general Wedderburn, in his excellent argument in that case, thus summed up the effect of all the authorities (*k*):—“A sentence is a

(*k*) The Duchess of Kingston's case, 20 Howell's State Trials, 478-9. See also *Gore v. Stackpole*, 1 Dow, 18, which was a case of a bill filed in the Irish Court of Chancery by a remainder-man.

judicial determination of a cause agitated between real parties, upon which a real interest has been settled;—in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question.” On the whole, I am of opinion that this case falls within the rule there stated, and which I quote from Mr. Wedderburn’s statement because of the aptness of the expressions. It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up. That then brings me to the body of the argument. There are only two grounds on which it is necessary to take time to consider; the first is, in what manner the compensation ought to be awarded; and, secondly, what is the effect and import of the length of time which has been suffered to elapse. I chiefly require time to consider these points, because on them, and on them alone, is the judgment of the noble and learned Lord in the Court below at all deficient in fulness. I ought however to add, that on the point of the lapse of time I am much in favour of the judgment of the Court below.

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Lord *Brougham* :—My Lords, I stated my views of this case very fully when it was previously before claiming to redeem, the estates having been sold under decrees of the Court of Exchequer; and *see* Lord Eldon’s observations, p. 33.

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your Lordships, I mean in the course of the argument; so that, after what I then threw out, I shall not feel it necessary to enter into any lengthened observations at present. There were two points on which the case depended. On one of them I expressed my opinion at the time, I had no doubt about it; if it had been well founded it would have gone to the jurisdiction of this Court. As to the other, which in itself embraced two points, I wished to take time to consider, in order to see what had been the grounds of my noble and learned friend Lord Plunket's opinion, for I could not see the reasons for that opinion in the report of the judgment furnished to me. I have since had a communication with my noble and learned friend, and I find that he took, when the cause was in his Court, a view of the subject similar to that which I took here; that he considered the points separately, and had come to the same conclusion upon them. I do not mean to say that this is a case free from doubt; but my doubts upon it are not so strong as to incline me to advise your Lordships to reverse the judgment of the Court below, for a Court of Appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong. I shall therefore move that this judgment be affirmed; but, as it is a case not entirely free from doubt, I shall move that it be affirmed without costs.

Affirmed accordingly.

## In the matter of the ISLINGTON MARKET BILL.

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Where a corporation had held a market by prescription, and the Crown afterwards granted to the corporation a charter with these words, “quod nullum mercatum infra septem leucas in circuitu burgi prædicti per nos vel hæredes nostros alieno concedatur:” Held, that such prohibition, if it could be construed to extend beyond that which is attached by the common law to the grant of a market, was void. Held also, that the establishment of a new market, to be holden at the same times within the common law distance of the old market, was *primâ facie* injurious to the latter, and therefore void; the convenience of the public would not, under such circumstances, justify the grant of a new market.

And where the first charter purported to be granted “de assensu prælatorum, comitum, &c. in instanti Parlamento convocato,” a new charter granted to hold a market within the prescribed distance would be void, and would be repealable by *scire facias*. The words stated would have the effect of giving the first charter the authority of an Act of Parliament.

Such a charter could only be repealed by Act of Parliament. If the market created by the first charter had not sufficient space for the accommodation of the public, and also, if part of the space originally allotted to it was employed or suffered by the grantee to be employed for other purposes, without his providing as convenient a place for the public to buy and sell in elsewhere within the limits of his grant, such circumstances would furnish a good defence to an action brought by him against any person for selling out of the market; they might also furnish ground for a *scire facias* to repeal the patent.

*Quære*, whether such circumstances would not render the

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grantee liable to an indictment for a misdemeanour? If they would, an action would also lie against him for his default. But while such grant remained unrepealed, no other market could be granted within the limited distance.

If by the terms of the grant the market was to be held in a fixed place defined and known by metes and bounds, should those limits not be sufficient, and the owner of the market have no power to enlarge them, a new market might be granted to such an extent as to supply the deficiency, but no more.

A BILL had been introduced into Parliament for the purpose of establishing a cattle-market at Islington. The corporation of the city of London presented a petition to the House of Lords, praying to be heard by counsel against the Bill. The prayer of the petition was granted, and the Bill was ordered to be argued by one counsel on each side.

Mr. *Harrison* appeared at the bar as counsel for the corporation against the Bill.

July 9. Mr. Serjeant *Merewether* was heard in support of it.

At the close of the arguments the following questions were proposed to the Judges:

A charter was granted by King Edward III. to the corporation of the borough of A., with these words, (inter alia,) "quod nullum mercatum infra septem leucas in circuitu burgi prædicti per nos vel hæredes nostros alieno concedatur." The corporation had continued to hold, as it before had been holden, by prescription, a market in Blackacre, and to take the profits thereof. A charter is now granted to B. by

the Crown, of a market to be holden in Whiteacre, within less than seven miles distance from Blackacre.

1. Is this second grant contrary to the first, and may it be repealed by *sci. fa.* as contrary thereto?

2. The same question, Whiteacre being less than seven miles distant from the borough of A.?

3. In either of the said cases, can it be pleaded or in any way taken into consideration that the benefit of the public required a new market to be holden other than markets holden by the corporation of A., and within less than seven miles from those markets, or from the said borough?

Mr. Justice *Park*, on behalf of himself and the other Judges, delivered the following answer:

I have to acquaint your Lordships, that my learned brethren and myself, in considering the questions propounded to us by your Lordships, assume that it is proposed to ask the first and second questions with reference to holding the new market at the same times with the old.

The Judges are agreed, that, if this clause adds any prohibition other than that which is attached by the common law to the grant of a market, it is void; for there is no consideration for such restriction, nor any additional benefit conferred upon the subject. That is, it is a prohibition imposed in respect of an old right, without a new consideration.

The establishment of a new market, to be holden at the same times within the common law distance of an old market, *prima facie* is injurious to the old market, and therefore void.

The Judges are also of opinion, that the circumstances mentioned in the third question, viz., that the benefit of the public required a new market to be

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holden other than markets already holden by the first grantee, would not of itself warrant the grant of such new market.

July 14.

In a subsequent debate on the Bill, the further opinion of the Judges was desired, and their Lordships having again attended the House, the following questions were put to them :

A charter was granted by King Edward III. to the corporation of the borough of A., with these words, (inter alia,) "quod nullum mercatum infra septem leucas in circuitu burgi prædicti per nos vel hæredes nostros alieno concedatur." And this grant purports to be made "de assensu prælatorum, comitum, baronum, ac totius communitatis regni in instanti Parlamento apud Westmonasterium convocato." And the charter begins, "Rex Archiepiscopis, &c. salutem." The corporation hath continued to hold as it before had been holden, by prescription, a market in Blackacre, in the borough of A., and to take the profits thereof. A charter is now granted to B. by the Crown of a market to be holden in Whiteacre, within less than seven miles distance from Blackacre.

1. Would the second charter as above mentioned, for holding a market within seven miles from the market at Blackacre, be illegal, and could it be repealed by *scire facias*?

2. Same question, within seven leagues from the borough of A.?

3. The Judges having informed the House, that in their opinion the circumstance of the benefit of the public requiring a new market would not of itself warrant the grant of a new market, their opinion is further required, whether the advantage of the public, coupled with the fact that the space of the prior

market is not sufficient for the buyers and sellers, could not be pleaded, or in any way taken into consideration, to warrant or support the grant of a new market within the limits of the common law ?

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4. Or whether the advantage of the public, coupled with the facts that the space of the prior market is not sufficient for the buyers and sellers, and that part of the ancient site of the market has been employed or permitted to be employed by the owners of the market, could not be pleaded, or in any way taken into consideration, to warrant or support the grant of a new market within the limits of the common law ?

5. Or whether, supposing the prior market to be granted in a fixed place, the advantage of the public, coupled with the facts that the place of the prior market is not sufficient for the buyers and sellers, and that part of the ancient site and place of the market has been employed or permitted to be employed by the owners of the market for other purposes than those of the market, could not be pleaded, or in any way taken into consideration, to warrant or support the grant of a new market within the limits of the common law ?

Mr. Justice *Littledale*, having conferred with the rest of the Judges present, delivered their unanimous opinion on the two first questions in the affirmative, but desired time to consider of the remaining three questions.

On a subsequent day, Mr. Justice *Littledale* delivered the unanimous opinions of the Judges present, upon these three questions, in the following terms :

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When three of the Judges, Mr. Baron Parke, Lord Commissioner Bosanquet and myself, attended your

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Lordships' House on the 14th of July, your Lordships were pleased to ask the Judges then present, whether the words of the charter of King Edward III. were such as to give it the effect of an Act of Parliament? and to which question, the Judges answered in the affirmative. That being so, it would appear that all the other questions which now await the opinion of the Judges are at an end, because if there be a prohibition by Act of Parliament from holding a market within seven miles of the borough of A., the king would have no right to grant a market to be held within seven miles under any circumstances whatsoever; but an application must be made to Parliament to repeal that Act which has embraced and confirmed the charter.

The third and fourth questions proposed by your Lordships, which are the two first of those on which the Judges requested time for consideration, may be conveniently answered together. These questions evidently apply to the grant of a market, not to be held in a certain spot defined or known by metes and bounds, but generally in the vill or district of Blackacre. There is no doubt but that the grantee of such a market may hold it anywhere within that vill or district, or in more places than one, and may change the place in which it is held; and an obligation is cast upon him by his acceptance of the grant, to provide convenient accomodation for all who are ready to buy and sell in the public market. If he does not do so, or if, after having once appropriated a particular site for the use of the public as a market-place, he afterwards employs or permits it, or part of it, to be employed for other purposes without providing as convenient a place for the public to buy and sell in elsewhere, within the limits

of his grant, the consequence would be first, that there would be a good defence to an action brought by the grantee of the franchise against any person for selling out of the market to the prejudice of his right, provided such person had been prevented from selling in the market by the want of convenient room. This point was decided in the case of *Prince v. Lewis* (a), and confirmed by that of *Mosely v. Walker* (b). A second consequence would be, that this breach of a public duty on the part of the grantee of the franchise might, unless those inconveniences were removed, and a sufficient space restored for the accommodation of the public, operate as a forfeiture, and furnish a ground for a *scire facias* to repeal the patent by which the market was granted. And thirdly, we are not prepared to say that such misconduct of the grantee would not render him liable to an indictment for a misdemeanour, in like manner as the grantee of a ferry is punishable for a default in providing proper boats and ferrymen, though we are not aware of any instance in which such a proceeding against the owner of a market has been adopted; and if an indictment would lie against him for his default, an action would also lie at the suit of any private individual who should have received any special injury thereby.

But these are the only consequences of the breach of duty committed by the grantee of the franchise; for we are of opinion that whilst the grant remains unrepealed, the default of providing proper accommodation for the public cannot operate in point of law as a ground for granting a new charter to another to hold a market within the common law distance, which shall really be injurious to the existing market. But

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(a) 5 Barn. & Cres. 363.

(b) 7 Barn. & Cres. 40.

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after the former grant has been duly repealed, a new charter may of course be granted to any one.

The fifth and last question proposed by your Lordships contains one circumstance which makes a very material difference in the consideration of the supposed case. This question relates to a market held by the terms of the grant in a fixed place, that is, as we understand it, in a place defined or known by metes and bounds, and containing a precise quantity of land. We are of opinion, that if those limits are not sufficient for the accommodation of buyers and sellers at the market, and the owner of the market has no power to enlarge the limits, that circumstance, coupled with the fact that it would be for the advantage of the public that a new market should be erected, would be a sufficient ground for the Crown to take such steps as would according to law have the effect of erecting a new market, to such an extent as would remedy the inconvenience, without affecting the rights of the owners of the old market; and for that purpose a writ of *ad quod damnum* might issue, and upon the inquiry returned on that writ, that the erection of a new market would not be to the damage of the owners or other persons, the Crown might grant such a new market as would not be to the damage of others. We do not say that a writ of *ad quod damnum* is absolutely necessary; but if the Crown were to grant a new charter without a writ of *ad quod damnum*, and it should appear that the interests of other persons were prejudiced, the Crown would be supposed to be deceived, and the grant might be repealed on a *scire facies*. *Vide* note in Fitz. Nat. Brev. 226; and according to the authority in 2 Inst. 406, "if one hath a market either by prescription or by letters patent of the king, and another obtains a market to the nusans of the

former market, he shall not tarry till he have avoided the letters patent of the latter market by course of law, but he may have an assize of nusans ;” and the same authority adds, “ there be words in the grant of a market, *ita quod non sit ad nocumentum alterius mercati.*” But in whatever form any proceedings are taken for the new market, we are of opinion that the new market can only be legally granted to such an extent as to provide for what may be called the surplus accommodation of the public beyond what the market of Blackacre can afford, and that the market of Blackacre is not to be affected by the new market: for instance, if the public require twenty acres of accommodation, and Blackacre could only afford ten acres, the new market could not be granted for the whole twenty acres, but only for the additional ten acres, so as, upon the whole, the twenty should be capable of being used by the public; and we think that if the proceeding by *ad quod damnum* should be adopted, the inquisition would probably be adapted to such a state of things.

For if a new market were granted for twenty acres, that would be to the damage of the old market, and might have the effect of totally ruining it, when there was no default in the owners of that market, but the necessity of the new market arose from the increase of population. This view of the case however is entirely new. We at least know of no instance where the question has arisen, for in general markets belong to districts, and then they may be changed or enlarged as the owners please. And as this point never has been argued by counsel, and as the opinion of three Judges only is asked, when the original questions were submitted to nine Judges, we do not feel so confident in this opinion as if we had come to the same conclusion after hearing counsel and conferring with the whole

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of the nine Judges to whom the questions were originally put.

Your Lordships will observe that it may by possibility happen that the limits of a district within which a market is to be held (though such market may not be confined to a certain place therein) may yet be so narrow, and the residue of the district not appropriated to the purpose of a market so occupied, that the grantee cannot possibly perform his duty by providing such accommodation as the increased exigencies of the public may require. Such a case would, we apprehend, be governed by the principle laid down in our answer to the fifth and last question, and the Crown would have a power to grant such new market as would be required for that portion of the public which could not be accommodated within the limits of the former grant.

Lord *Brougham*.—I am sure that your Lordships are much indebted to the Judges for the very learned answers they have given to your Lordships' questions. The opinion they have given is undoubtedly a qualified one, but then it is clear that we can run no risk from acting on it thus qualified. Your Lordships only put the question whether the charter intended to be granted was inconsistent with the old grant. Your Lordships put the feigned case of a new and an old charter. But the Judges have stated that in such a case as we have stated, namely, with such words in the charter, it is to be taken as equal to an Act of Parliament. Now an Act of Parliament, as we know, can touch anything, and that which has been created by one may be taken away by another. The answer, therefore, does not decide the fate of the Bill. The fact that the Islington Market Bill may be incon-

sistent with existing rights, is not decisive of the question whether you ought to pass that Bill, for that must be the case with all local Acts and with all Bills for the dissolution of marriage. Yet it is clear, that, with respect to these, Parliament has an undoubted power to pass them. All, therefore, that you have obtained from the Judges, so far as relates to your guidance in the present case, is the expression of an opinion that but by a new Act of Parliament old rights cannot be interfered with. But that may be the best foundation for asking for the new remedy. The question of compensation may be affected by this opinion of the Judges, but nothing more; but your Lordships cannot grant this compensation, and the other House of Parliament has dealt with the Bill already. You may suggest an amendment, and the other House may tack a clause of compensation to the Bill.

The Earl of *Devon* quite agreed with what had just fallen from the noble and learned Lord.

The opinions of the Judges were ordered to be entered on the Journals (*a*).

The Bill afterwards passed both Houses and received the Royal assent.

(*a*) See the Lords' Journals for 1835, pp. 285, 583, 584.

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# REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

ON APPEALS AND WRITS OF ERROR.

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## APPEAL

FROM THE COURT OF SESSION.

1835.

April 10. 16.

JOHN MACTAGGART, jun., and Others - *Appellants.*

WILLIAM WATSON - - - - - *Respondent.*

Watson undertook by bond jointly and severally with the trustee of a bankrupt estate in Scotland to answer to the extent of 1,000*l.* that the trustee should faithfully discharge his office, account for his management of the estate, &c. The creditors of the bankrupt, according to the bankrupt law in Scotland, chose commissioners to act for them, and to superintend the proceedings of the trustee. The trustee having managed the estate for thirteen years without censure, was, in the fourteenth year, found to have, by various contrivances amounting to fraud, abstracted from the bankrupt estate a large sum, and his accounts were deficient to the amount of 1,008 *l.* The bond being put in suit against Watson, the co-obligor and surety, he pleaded that the commissioners, by neglect and connivance, had caused and permitted the trustee's default, or, knowing it, had concealed it from him, but of this imputation he did not give any proof, and it was denied by the commissioners: HELD, by the Lords, reversing the judgment of the Court below, that

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the surety was not discharged from his obligation by the alleged neglect of the commissioners in not detecting the fraud and malversation of the trustee.

THE estates of the Gorbals' cotton-spinning and manufacturing company, and of Alexander M'Kerlie as a partner thereof, having been sequestrated under the Bankrupt Act, (54 Geo. 3, c. 137,) in the month of September 1815, Mr. William Jeffrey was elected and confirmed trustee on the sequestrated estates on the 10th of October next following, and the Respondent became cautioner or surety for his fidelity in office, and for a faithful account of his intromissions, to the extent of 1,000*l.* The bond granted by them on that occasion, after reciting the sequestration, &c., proceeded thus:—"Therefore I, the said William Jeffrey, as principal, without limitation, and I the said William Watson, as cautioner, surety, and full obligant, with and for the said William Jeffrey, to the foresaid extent of 1,000*l.* sterling, hereby bind and oblige ourselves jointly and severally, renouncing the benefit of discussion, and our heirs, executors and successors whomsoever, that I, the said William Jeffrey, shall and will manage the said estate in all respects conform to the statute under which the sequestration was awarded, and that I shall and will hold just count and reckoning, and make payment to the said creditors according to their several claims ranked upon the said sequestrated estate, or the trustees or trustee that may be afterwards named by the creditors to succeed me, for my whole management, receipts and intromissions as trustee foresaid, with the property of the said estates, or any part thereof, of whatever kind or denomination, and wherever situated, which may come into my hands as trustee foresaid, and that from

time to time, when required," &c. Commissioners were soon afterwards elected by the creditors, according to the requisitions of the said Act, to superintend the trustee's administration of the sequestrated estates, from which he soon realized a considerable sum, and a dividend of 2s. in the pound on the proved debts was declared by order of the commissioners, and paid before the statutory period. A further dividend of 6d. in the pound was declared in May 1820, when the trustee presented a report of his management and intromissions with the estate to the commissioners, who examined the same and found it to be correct. He again, in May 1826, presented to them a report accompanied with a statement of his whole accounts up to that period. The commissioners examined this statement, and found upon the face of it a balance of 67*l.* 11*s.* 11*d.* in favour of the trustee, which was caused by the disbursements made by him, with the sanction of the creditors, in resisting, in a long course of litigation, various claims made on the bankrupt estate by Mr. John Mactaggart of London (*a*). With the exception of the property involved in that litigation, the estate was, at this period, considered as wound up and recovered; and there was no call for an audit of the accounts again until January 1829, when the new commissioners then elected, on the resignation of the former commissioners, called upon the trustee to exhibit a state of the funds. Upon the investigation which was then made into the accounts, Mr. Jeffrey was found to owe to the estate 1,008*l.* 12*s.* 2*d.* On that discovery he resigned the office of trustee, and Mr. James Kerr having been elected in his place, after several ineffectual applications to him, and to

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(*a*) See *Mactaggart v. Jeffrey*, 4 Shaw & W. 361.

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his cautioner, the Respondent, for a settlement of the said deficiency, raised an action against them for payment of the 1,000 £., the amount of the bond. One James William Robertson was also a defendant to the action, in respect of the share which it was alleged that he had taken in the management of the bankrupt estate, as a partner of Jeffrey. The summons concluded to the effect, "First, that the said W. Jeffrey and J. W. Robertson should be decerned, conjunctly and severally, to hold just count and reckoning with the pursuer, as trustee foresaid, for the whole of their joint and individual actings and management, in regard to the said sequestrated estates, and for that purpose to exhibit a full and accurate state of their accounts, and of their whole joint and individual intromissions with the said estates, with the vouchers for the same, whereby the balance due by them, or either of them, to the pursuer, may appear, and be ascertained; and they should be decerned to make payment, conjunctly and severally, of such sum as shall appear, upon a proper accounting, to be the true balance remaining due by them, or either of them, on account of the said sequestrated estates, &c. Secondly, that the said W. Watson, as cautioner aforesaid for the said W. Jeffrey, and also as full obligant along with him, in terms of the foresaid bond, should be decerned, conjunctly and severally, with the said W. Jeffrey and J. W. Robertson, or with the said W. Jeffrey, to make payment to the pursuer, as trustee foresaid, of the sum of 1,000 £. sterling, being part of the balance admitted to be due by the said W. Jeffrey on account of the said sequestrated estates, and to which extent the said W. Watson is liable, under his bond of caution before mentioned, together with the legal interest of the said sum of 1,000 £., from the date of citation to follow hereon," &c.

The Respondent, in his defence to the action, alleged that he was not a creditor upon the estate, and had no opportunity of knowing anything regarding the transactions of the trustee, or the proceedings under the sequestration. He trusted that the creditors and their commissioners would do their duty in maintaining that check over the trustee's proceedings which, by the statute, they were empowered and required to do. That in the summons no explanation was given as to the cause of the extraordinary arrear into which the trustee was allowed to run, or of the delay on the part of the creditors and their commissioners in calling him to account for so very long a period, and until he himself had become bankrupt. That the whole of the alleged defalcation proceeded from the commissioners and creditors having entirely violated and disregarded the course of management and procedure, which it was incumbent on them to follow, with reference to the trustee's intromissions. That it appeared from a minute of the meeting of the commissioners in May 1826, that the trustee laid before that meeting the Glasgow Bank receipt for 3,400*l.*, being the money then in the bank belonging to the estate, and they approved of its transmission from the Royal to the Glasgow Bank, which was done with their knowledge and approbation at the time the transference was made. The Respondent insisted that that operation was unwarranted and illegal, as by the 43d section of the Bankrupt Act, the trustee is bound to lodge all the money he receives in the Royal Bank, Bank of Scotland, or Bank of the British Linen Company, unless he has been directed by four-fifths in number and value of a general meeting of the creditors to lodge it in some other bank, which did not appear to have been done in this case; and he had reason to believe that the

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money was lodged and the receipt dated only a few days before, and that, had the commissioners performed the duty imperatively enjoined on them by the said section of the Act, they would have found that, for a long period previous to the date of the receipt, the money had not been in any bank at all. They had utterly failed to observe the course prescribed by the enactment. They had previously allowed the sequestration to go to sleep for about six years without anything being done, and without ever taking the precaution pointed out by the statute of comparing the sums lodged and drawn by the trustee in his bank account, with the sums received and disbursed by him; and they never at any subsequent period made any examination or inquiry whatever with regard to the intromissions of the trustee, or to the deposition in bank of the funds in his hands. That the commissioners and creditors also neglected to attend to the requirement of the 37th section of the statute, by which the trustee is bound, once in every three months, to make up a state and estimate of the estate, and the commissioners are bound to subscribe every such state in the *sederunt* book. The various periods also pointed out by the statute for auditing the accounts with a view to after dividends, were allowed to pass without anything being done to investigate the situation of the bankrupt estate. On all these grounds the Respondent claimed to be discharged from his cautionary obligation.

After the action had for some time proceeded, an arrangement was entered into between Mr. Kerr, as trustee on the estate, with consent of the commissioners and creditors, and the Appellants, by which, on certain considerations, there were made over to the Appellants the whole assets of the sequestrated estate, and, amongst others, the right of claim form-

ing the subject of this action. By an interlocutor, dated May 1832, the Appellants, who are the representatives of the said John Mactaggart of London, deceased, were sisted as pursuers in the action in place of James Kerr and as his assignees.

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By an interlocutor, dated 12th November 1833, the Lord Ordinary, having considered the closed record and whole process in respect to William Watson, sustained his defences, and accordingly decerned, finding him entitled to his expenses, &c.; and his Lordship added the following note explanatory of his judgment: "The Lord Ordinary thinks, that in various respects, but in particular in respect to the money falling to be in bank, there was a gross failure by the commissioners to observe the regulations of the statute provided to control the trustee; and the Lord Ordinary further thinks, that in all probability this neglect of duty was the cause of the embezzlement which produced the loss. The trustee, Jeffrey, did not snatch the money and run off. Even at the end, he seems to have taken the use of it, in the hope of replacing it before it was missed, a hope encouraged in him by the want of any examination of his accounts with the banks, and indeed of keeping or exhibiting any accounts with the banks at all."

A reclaiming note was presented by the Appellants to the Lords of the Second Division, by whom the following interlocutor was pronounced: "24th January 1834. The Lords having considered this note, with the other proceedings, and heard counsel thereon, adhere to the interlocutor complained of."

The appeal was against these interlocutors.

Mr. *Pemberton* and Mr. *Keay* for the Appellants:—  
 The Court below altogether overlooked, or did not



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give sufficient weight to the fact, that the Respondent was himself surety that those very things should have been done which he alleges were not done, and he was not therefore entitled to complain of the omission or neglect of them. The bond in its express terms contains two several obligations ; the first is, " That I, the said William Jeffrey, shall and will manage the said estate in all respects conform to the statute under which the sequestration was awarded." The second obligation, which is distinct from and additional to the first, is, " And that I shall and will hold just count and reckoning, and make payment, &c. for my whole management, receipts and intromissions, as trustee foresaid." Besides the main obligation to make payment of any pecuniary balance which Jeffrey might owe to the estate, here is a most distinct and unequivocal obligation on the Respondent, binding him to guarantee that Jeffrey should do all those things in discharge of his office which the statute requires to be done. The security gained by this obligation can never be held to be superseded by the appointment of commissioners, or by the manner in which they may have discharged their duty. If that duty is rightly performed, the creditors have both the statutory checks in full operation ; if one of those checks fail them, by a negligence on the part of the commissioners, that affords no reason why the other should become entirely inoperative. It is utterly to mistake the whole intendment of the statute to assume that the diligence of the commissioners is to be the measure of the cautioner's liability, and that their negligence must form his discharge. The commissioners are gratuitous officers, and therefore to a large extent irresponsible, because it would require something nearly approximating to actual fraud to subject

them to pecuniary liability. It is out of the question therefore to expect from these any close or laborious superintendence of the trustee's proceedings. It is equally unreasonable to expect any efficient superintendence from the general body of creditors, who are generally scattered over the country, and not in a situation to attend to the management of the trustee. It is different with the cautioner; he has it in his power always to be accurately informed of the proceedings of the trustee; he is entitled to have the minutes of procedure and the accounts of the estate laid open to him. If information is withheld from him by the trustee, he is entitled to compel it by application to the commissioners and creditors, and if they do not put an end to the irregularity complained of, he then may demand to be freed from his bond. The cautioner therefore has ample control over the conduct of the trustee. *Hamilton v. Calder (b)*, *Wallace v. Landers (c)*, *Eadie v. How (d)*.

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Even were there any foundation for the argument of the Respondent in the Court below, it would be altogether inapplicable, in so far at least as regards the sum of 700*l.* which was feloniously abstracted from the bank by the trustee. For reimbursement of that sum to the estate the Respondent must be held liable, in any view whatever of this case. That sum was abstracted in this way: In May 1829, the funds of the estate, amounting to 3,125*l.*, were lying deposited in bank; 2,425*l.* in the Glasgow Bank, and 700*l.* in the bank of the British Linen Company. Jeffrey was required to transfer the whole sum into one account with the Royal Bank of Scotland. He did transfer the 2,425*l.* from the Glasgow to the Royal Bank accordingly. But the 700*l.* in the bank of the British

(b) Dic. of Deci. 2091. (c) Id. 2096. (d) 7 Shaw & D. 356.

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Linen Company he took out, and appropriated it to his own purposes; whilst, to conceal the fraud, he played off the ingenious manœuvre of drawing from the Royal Bank, and re-lodging the next day 700*l.* of the money there deposited, so as to get a separate deposit receipt for this sum of 700*l.* to be exhibited to the commissioners, as if it were the proceeds of the money in the British Linen Company Bank regularly transferred. Were the principles on which the Respondent founds his argument indisputable, they are altogether inapplicable to this case, in which an act is committed by the trustee which no precaution could prevent and no ingenuity anticipate. No man could possibly suspect that Jeffrey was acting the part of a thief; no one could have prevented the theft from being perpetrated.

Sir *John Campbell* and Mr. *M'Niell* for the Respondent:—

The sequestration lasted for 14 years, during which the commissioners affected to audit the trustee's accounts four different times, in 1816, in 1818, in 1820, and in 1826. But during the whole of that period the commissioners did not put in operation the check provided by the statute, in the examination of the bank account and comparison of its entries. The trustee was allowed and encouraged from the commencement to intermeddle with the funds of the estate, to an unlimited extent, as if they had been his own, and that in a manner apparent and discoverable on the very face of the bank accounts, and such as ought instantly to have been put a stop to by the commissioners: and that system, after advancing from year to year in an increasing ratio, ended at last in the direct fraud to which the Appellants impute the ultimate defalcation.

According to the account of the Appellants themselves, there were various stages at which the whole funds of the estate were secured, and at which, if the trustee had then been removed for his intermediate misconduct, as he should have been, no loss would have accrued to the estate.

In undertaking an obligation as cautioner for the trustee's discharge of his official duty to the creditors in terms of the Bankrupt Act, the Respondent was entitled to rely on the provisions of that statute being fairly and substantially observed in those matters in which a control was provided on the part of the creditors over the proceedings and management of the trustee. But the total omission and violation of those provisions on the part of the creditors and their delegates, the commissioners, was such a change of the Respondent's situation and of the contract into which he entered, that he was no longer bound as cautioner. If the commissioners omitted entirely, during the 14 years that the sequestration lasted, to make any examination under the statute of the trustee's bank account, that was an entire departure from the understood terms of their statutory engagement with the Respondent. On the other hand, if they examined that account, and did not put a stop to the gross malversations and irregularities apparent on the face of it, they then sanctioned a course of management on the part of the trustee essentially different from that for which the Respondent became bound, and in either view the Respondent is discharged. The mode of dealing with the trustee, by requiring merely at the distance of several years, or receiving as satisfactory the production of deposit accounts of recent dates, without any examination of the intermediate entries, was such a departure from the duty of the commis-

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sioners, as to liberate the Respondent. The trustee's accounts having been audited from time to time, dividends struck and accepted, and sums of commission allowed to him, without any complaint against him for 14 years, the Respondent was entitled to believe that he was proceeding in all respects regularly, and to the satisfaction of the creditors, and cannot now be made liable for the deficiencies of a trustee, who is found to have been openly violating his duty in a course of misapplication of the funds without control or challenge.

In the course of the argument the following cases were cited, besides others which are noticed in the judgment: *Mactavish v. Scott* (e), *Duncan v. Porterfield* (f), *Mein v. Hardie* (g), and *Dalziel v. Menzies* (h).

Lord Brougham.—The bond is not given to any individual as obligee, but it is an obligation to the extent of 1,000*l.* by the trustee and his cautioner jointly, and in which both are obligors. As the condition is that W. Jeffrey shall faithfully and regularly discharge his office of trustee, and as the creditors afterwards chose three commissioners to act for them, and in a manner to represent them in their dealings with the trustee, and to some extent to control, or at least to superintend his proceedings, we may allow it to be held that these creditors, and the commissioners appointed by them, and acting on their parts, are the obligees, and that their acts, as for example, in releasing the principal obligor, Jeffrey, would discharge Watson, his surety; that any connivance at Jeffrey's misconduct, and any act otherwise injurious to the rights and equity of the surety, and done behind his

(e) 4 Wils. & S. 410.

(f) 5 Shaw & D. 111.

(g) 8 Shaw & D. 346.

(h) 9 Shaw & D. 434.

back, would release him, as much as if the bond had been given to them, instead of being left indefinite as to the person of the obligee. We are thus making suppositions the most favourable to the Respondent, for we are not only assuming the creditors to be represented and bound by the commissioners, but we are allowing the Respondent to be a surety only, whereas he is a principal, being a joint and several obligor.

It appears that the trustee, by a series of irregular proceedings, and by various contrivances amounting to fraud, in respect to the sequestrated estate, was found in arrear in his accounts to the amount of 1,008*l.* 12*s.* 2*d.*; and the trustee who succeeded him put the bond in suit against the Respondent, who defended himself by accusing the commissioners of great neglect in their superintendence of Jeffrey, of conniving at his misconduct, and of generally failing to discharge their duties, under the Bankrupt Act, towards the creditors, as also their duties towards himself in his capacity of Jeffrey's surety. But all, or almost all, these charges are denied by the late trustee who first raised this action, and by the Appellants, his assignees, and also by the commissioners. They deny all knowledge or suspicion of Jeffrey's frauds, which were, indeed, for the most part, so cunningly devised as to escape even a close scrutiny; they deny all laches or negligence in the discharge of their own office; they only admit that their meetings were not held as often or as regularly as the Scotch Bankrupt Act directs; and they also admit that a sum lodged in the Royal Bank by Jeffrey, as the Act requires, was with their privity and consent transferred to a Glasgow bank, of which one of themselves, a large creditor of the bankrupt, was a partner, but

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which was perfectly solvent, and by which no loss whatever has accrued to the estate (i).

Upon this latter fact, thus admitted in the pleadings, I have to observe that it was most irregular in the commissioners to allow the transfer of the fund from one of the three banks expressly named in the statute without the consent of their constituents, the creditors, and they are the more to be blamed that one of themselves, or his banking-house, was to profit by the operation. Had any loss occurred by the proceeding, not only would the surety have been discharged from all liability in respect of it, but the commissioners would have been accountable for the whole amount of it to the creditors at large; but no loss having accrued on that score, and Jeffrey having done no act of malversation or even of neglect, up to the date of that transaction, I am clearly of opinion that the Respondent is not, at least by the transfer, discharged from his obligation in respect of Jeffrey as regards his subsequent dealings.

The Court below having assoilzied the Respondent in respect of the neglect and irregular conduct of the commissioners, which their Lordships held to operate the surety's discharge, the appeal is brought from that decree, and we are now to see upon what grounds it rests; and first of all, I have to remark that in this, as in so many of the Scotch cases, we find extremely little attention paid to the facts, hardly any care being taken to ascertain what these are, by examining which of the statements on either side is admitted, and which denied, or not admitted by the other. The matters of fact are thus too often passed over as of little moment, in order to get at the matter of law, on which all the pains both of the bar and the bench are be-

(i) See *White v. Baugh*, ante, 44. 60 & 61.

stowed; but on the facts everything must depend, and it is to be noted in this case that the facts are assumed, —assumed, too, all one way and against the Appellants, in the face of their positive denial and in the absence of proof. The Court below took for granted that the commissioners acted with gross negligence in the performance of their duty (though this is denied), and assumed that out of their negligence arose the malversations of Jeffrey, or the opportunities of committing them—opportunities which, but for the laches of the commissioners, he could not have had; and yet not only is this charge of negligence denied, but upon all the circumstances, as they appear in the case, I really do not think, even morally speaking, and to say nothing of legal evidence, that the fact is so, as assumed by the Court. But another thing, if possible still more important, has been equally overlooked, the frame of the bond itself, the whole ground of the action. The obligation is, that “W. Jeffrey shall manage the estate in all respects conform to the statute under which the sequestration was awarded,” as well as that he “shall hold just count and reckoning, and make payment to the creditors according to their several claims:” count and reckoning for what? “for my whole management, receipts and intrusions, as trustee, with the whole estate.”

Now the main reliance of the Respondent, and in which view the Court below fully shared, is upon the supposed fact of the commissioners having been careless in calling on Jeffrey to render accounts, and in other respects to perform his duty under the statute. They say that it was the office of the commissioners to see that he did properly discharge his duty; that the cautioner relied on their performing that office, and that their non-performance creates a case which he

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never contemplated, and to which his suretyship cannot apply. Was it of no moment to observe that the performance of the statutory duties by Jeffrey was one of the very things for which the obligation bound his surety? Assuredly it is no argument against my being answerable for a man's not doing a certain thing that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation that the other party, the obligee, did not see to his proceedings. The statute and the bond have the very same object of giving the creditors a double security against malversation of the trustee—the superintendence of the commissioners and the obligation of the surety. The argument of the Respondent here, and by which he swayed the Court below, at once cuts off one of these securities, and leaves the creditors only protected by the other. The duty incumbent on the commissioners, as a pledge to them, continues; but that security they had without the bond, and I do not see how the bond can avail them at all, or why it was to be taken if this argument prevails.

The defective state of the facts in this case to support the Respondent's defences, renders it unnecessary for me to enter upon many of the legal questions raised on little or no foundation, and discussed with no profit, because with no application to the case at bar; I may, however, observe that very dangerous doctrines on suretyship obligations appear to be suggested in some of the cases in Scotland—cases which have never been brought by appeal to your Lordships. The language of the learned Judges is calculated perhaps to convey, as reported in the books, a meaning far stronger than their Lordships intended. They are really made to

speak more of the obligee's duties than of the obligor's covenants—of the duties towards the surety, which a person indemnified and guaranteed is bound to perform, rather than of the obligation which that surety has incurred towards him; a closer watch is thus kept over the conduct of the party who has taken an indemnity, than over the liability of him who has given it. Now that the obligee may by his conduct release a surety in certain cases, no one can doubt. The holder of a bill of exchange giving time to the acceptor, discharges the indorser from his suretyship liability, even at law, and so in any other guarantee by simple contract; and in equity, the obligee in a specialty may do so, by giving indulgence or otherwise injuring the recourse of the surety or co-obligor; and all this upon the ground that the surety has a right to stand in the place of the creditor, holder, obligee, or other party indemnified, and must not have his rights or equities voluntarily cut down by the acts of that party. But while at law the surety in a bond is not at all discharged, even by a long neglect of the obligee to demand payment or account from the principal,—nay, when the latter has become insolvent during the time thus suffered to elapse, as was decided in the *Trent Navigation Company v. Hardy* (e), the courts of equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought, or not having given early notice of his failure or non-payment to the surety. The case of Law, one of Mr. William Tierney's sureties in Calcutta, against the East India Company, at the Rolls, in 1799, gave rise to much discussion on the law of

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principal and surety, and to an elaborate judgment by Lord Alvanley (*f*). But there were other circumstances very different from such laches to govern that judgment, and especially the payment of a supposed balance to the representatives of the principal debtor by the East India Company's servants, which was justly held to be an acknowledgment, to the benefit whereof the surety was well entitled. It is, however, undeniable that the courts of equity will look narrowly to every thing in the conduct of the obligee which has a direct tendency to wrong the surety and injure his rights and equities, and will, as Lord Loughborough said in *Rees v. Berrington* (*g*), lay hold of such errors to release him. The error, however, in the present case arises in supposing that any want of care on the commissioners' side, in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities, or diminution of his rights at law.

However, we need not discuss such questions in this case, nor deal with the English decision in *Montague v. Tidcombe* (*h*), which was that of a positive and express covenant given to the surety by the obligee. Neither are we called upon to dispute the doctrine of the Court below, laid down here, and in *Mein v. Hardy*, that where any one gives security for the conduct of another, in a certain office which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law and discharge their duties. All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a per-

(*f*) 4 Ves. 824.

(*g*) 2 Ves. jun. 540.

(*h*) 2 Vern. 518.

son's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened. The present is not such a case; the facts are not here to govern any such conclusion, and therefore I am of opinion that the surety, Mr. Watson, was not discharged.

I have, therefore, to move your Lordships that the interlocutors appealed from be reversed, and that you remit the cause to the Court below, with instructions to decree in terms of the second conclusion of the summons; that is, the conclusion relating to Mr. Watson, the only party here before your Lordships.

Ordered accordingly by their Lordships, that the said interlocutors (of the 12th of November 1833, and of the 24th and 25th of January 1834), so far as complained of, be reversed; and that the cause be remitted back to the Court of Session, with instructions to decree against the Respondent, William Watson, in the terms of the second conclusion of the libelled summons, and to do further in the case as will be consistent with this judgment.

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## APPEAL

FROM THE COURT OF SESSION.

JACOB YATES - - - - - *Appellant.*ALEXANDER THOMSON and Others - - *Respondents.*

*Devisee and  
Executor.  
Foreign Law  
and Practice.  
Principles of  
Construction.  
Rules of Evi-  
dence.  
Appropriation  
of Money.*

J. Y., born in Scotland but domiciled in England, bought a Scotch estate, paid part of the price, and for the remainder—which was declared to be a lien on the estate—he gave a bond, payable within a given time, if all pre-existing incumbrances affecting the estate should be then discharged. The vendor assigned the bond and real lien to the bank of L., who gave J. Y. notice thereof. J. Y., finding that the incumbrances were not discharged at the expiration of the time for payment of the bond, deposited the principal and interest in the bank of Scotland, and informed the assignees that the money was so consigned, but should be paid to them on producing discharges from the incumbrances. The assignees produced some discharges, and received a proportion of the deposit. The balance remained in the bank, on receipts taken in J. Y.'s name, up to the time of his death.

J. Y. before his death executed in England several instruments in writing. In a will respecting his Scotch estate, he declared his will to be, that the said receipts of deposit should become the property of certain trustees of that estate, and be endorsed to them by his executors in a will of his English property, the money to remain in deposit until the titles of the estate should be cleared, and then to become the property of the vendors' representatives on payment of the bond. He then made a will respecting his English property, appointing executors, and afterwards cancelled it. He subsequently executed a trust-deed, disposing of his Scotch estate, and therein declared that he had, in a separate will respecting his English property, directed his trustees and executors to endorse the said

receipts to the trustees of his Scotch estate. He afterwards made a will disposing of his English property, and thereby gave his goods and chattels, wherever situated, to his nephew, and appointed him sole executor and residuary legatee. He obtained probate of the will, and claimed thereunder the bank deposit, in a suit instituted in Scotland between him and other claimants.

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**HELD**, first, that the Scotch court had a right to look to the first will for discovering the testator's intentions respecting the deposited money; secondly, that, without looking to that will, the trust-deed contained a sufficient declaration of J. Y.'s intention to appropriate the money to his trustees for payment of his bond.

Following up the principle that the *lex loci domicilii* governs the distribution of personal estate, the Scotch and all foreign courts are bound, in the interpretation of a testator's written declarations of intention touching his personal estate, situated within the foreign jurisdiction, to adopt the principles of construction applicable to such instruments by the law of the testator's domicile, and that law, being matter of fact, is to be inquired after like other facts; but they are not bound to adopt foreign rules of evidence, every court having its own technical rules of procedure.

**MR. JAMES YATES**, a native of Glasgow, left Scotland when very young, became a merchant in London, and died on the 26th of August 1829 at his estate of Woodville, near Salcombe, in Devonshire, at the age of 74, having been resident in England for the preceding 60 years. He had been married, but at his death left neither widow nor child. In the year 1815 he purchased from Colonel Alexander Macdonald, of Lynedale, the lands and island of Shuna, one of the Hebrides in Scotland, for 10,500 *l.* The lands being burdened with debt, Mr. Yates paid only 5,000 *l.* of the price; the remainder (5,500 *l.*) was declared, in the conveyance to him, to be a *lien* on

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the lands, and he at the same time granted a personal bond for that amount, payable at Candlemas 1819, with interest to be paid half-yearly up to that time; but it was declared in the bond, that all the incumbrances affecting the lands were to be fully discharged before payment of that balance. This bond was assigned in July 1817 by Colonel Macdonald to a Mr. Campbell, of London, together with the real *lien* created over Shuna, and the bond and *lien* were again in the same year assigned by Campbell and Colonel Macdonald to the Leith Banking Company. This assignment was notified to Mr. Yates, with an application for payment; he, finding on inquiry, early in 1819, that the incumbrances affecting Shuna were not then cleared off, declined to pay, but deposited on the 2d of February in that year the sum of 5,649 *l.* 2 *s.* 5 *d.*, (being the whole principal and interest then due on the bond,) in the Bank of Scotland, in the name of Samuel Rose, esq., commissioner of excise in Edinburgh. Mr. Rose's name was used for mere convenience, on account of the remoteness of Mr. Yates's residence.

Mr. Yates's object in making this lodgment will best appear from the following extracts from a letter, which Mr. Pearson, his law agent in Edinburgh, wrote to Mr. Kerr, agent for the Leith Bank: "Agreeably to what I stated to you I wrote to Mr. Rose, and communicated to him your wish that the money should be paid into your bank. I have not yet seen or heard from Mr. Rose in answer; but, in pursuance of the arrangement with that gentleman, the amount of Mr. Yates's bond, with interest, was paid into the Bank of Scotland yesterday before three o'clock, &c. The estate of Shuna appears to have been overloaded with debt; and it is quite evi-

dent, both from the nature of the thing and from the express terms of the bargain, that there must be legal evidence of the extinction of the debt produced previous to payment of the bond. If the evidence alluded to be ready to be produced, I am ready on half an hour's notice to pay the money; and I do hope this will be immediately done. All I presume which can be asked of Mr. Yates is, payment of the contents of his bond and interest up to yesterday, and which I was ready to pay. Matters not being ready to close the transaction, Mr. Yates had no alternative but to consign the money, and which has been accordingly done. Any loss arising from interest, subsequent to yesterday, surely cannot attach to Mr. Yates, and therefore your recourse will be against Colonel Macdonald. The bond is quite explicit, in the point that all incumbrances must be cleared before payment; and, in so far as this is not done, Mr. Yates is entitled to retain from the price. He has, however, not the most distant wish to do so; but if he is obliged for safety's sake to do it, he cannot consent to keep the money and to pay five per cent., consequently it must be consigned. I am perfectly willing, however, to pay any sum to account on a proper discharge, and on a sum sufficient to pay all apparent incumbrances and expenses being allowed to remain deposited in the bank."

On the 12th of March 1819, Mr. Yates authorized Mr. Rose to advance 4,000 *l.* of the deposit, towards further payment of the purchase-money, to the Leith Banking Company, who satisfied him that so much of the incumbrances in Shuna were cleared off. The balance then left in the Bank of Scotland was 1,649 *l.* 2 *s.* 5 *d.*, which continued so deposited until August 1826, when Mr. Rose, unwilling to continue

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longer in such a protracted trust, with the consent of Mr. Yates gave up the receipt granted to him by the bank when the deposit was made; and Mr. Yates took in his own name two receipts, one for the said balance of 1,649 *l.* 2 *s.* 5 *d.*, and another for 387 *l.* 12 *s.* 6 *d.*, the interest then due on the same, and the money continued vested with that bank on those receipts up to the time of his death. These are the sums in dispute between the parties to this appeal.

In the years 1828 and 1829, Mr. Yates executed several instruments in writing; by the first of these, which is dated the 15th of April 1828, and which he described as "the last will of me, James Yates, of Salcombe, &c., as it respects the island of Shuna," he appointed as executors or trustees of that will, Alexander Thomson, banker in Greenock, Thomas Waller, wine-merchant in London, and Henry Strong, maltster of Salcombe, "to whom I give and devise my said island of Shuna, with all its appendages, in trust to assign and convey the same, as soon after my decease as can conveniently be, and in the proper legal mode required by the Scotch law, to the Lord Provost and principal magistrates of the city of Glasgow (my native place) for the time being, and to their successors for ever, in trust to them and their said successors, for the uses and purposes hereinafter mentioned." The trust was, that "the said magistrates and their successors, upon receiving the rents and profits of the same, which I now reckon worth 500 *l.* a year, and which may be very considerably improved, shall divide the same in the following manner, after deducting all the charges of management and collection that may have been reasonably incurred." He then directed the distribution of the rents; viz. one-

fifth for the use of the city of Glasgow, in public buildings or other useful and charitable purposes; two-fifths for the University of Glasgow; one-fifth for Anderson's Institute; and one-fifth for the public Infirmary. He then recommended the mode of management of the island, and added:—"As the island of Shuna appeared from the public records to be greatly encumbered when I bought it in 1815, and the title-deeds were, in consequence, very defective, a moiety of the purchase-money was retained till these defects were purged, and there still remains a balance of 1,500 *l.*, with interest, amounting together to about 2,000 *l.*, deposited in my name, in the Royal (*a*) Bank of Scotland, for which I possess the bank's notes or receipts. My will is, that, after my decease, these notes or receipts shall become the property of, and be indorsed or transferred by my executors, in another will respecting my property in England, to my said trustees, the magistracy of Glasgow; but that the money should remain where it now is, till the defects in the title-deeds, as abovementioned, are cured, or till the said trustees are fully satisfied with respect to the same, and till an entry is made with Lord Breadalbane, the superior of Shuna, to whom a yearly feuduty of 8 *l.* is payable of a new vassal, after the death of M'Lean, the existing one, according to a stipulation made by me with Colonel Macdonald, my predecessor in Shuna. These done, the sum in deposit will become the property of his successors or assigns (for he is deceased), and must accordingly be transferred or given up to them, on discharging an heritable bond by me to the Colonel, for the unpaid part of the original price."

By another "last will of me, James Yates," dated the

(*a*) This was a mistake: it was the Bank of Scotland.

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1st of May 1828, and purporting, like the former, to have been signed and sealed in the presence of three witnesses, he left certain legacies and annuities to relations and others; and bequeathed to the Appellant all his chattels and effects, of whatever nature, together with the life-rent of all his lands and houses, excepting Shuna, and gave him also the power of disposal of certain heritable property at Camlachie, near Glasgow, worth, as he believed, 5,000 *l.* He appointed as executors of this will the said Mr. Waller and Mr. Strong, "whom I have also named as executors and trustees in a separate will, which disposes of Shuna, and of a deposit of money which lies in deposit in the Royal Bank of Scotland, and is to remain there, till certain defects in the title are cured."

As a Scotch deed, intended to dispose of the island of Shuna, the first-mentioned will was ineffectual. It did not contain those dispositive words which by the law of Scotland are necessary in conveying real property; accordingly, Mr. Yates, after sending a copy of it to Mr. Thomson, one of the trustees, and his particular friend in Scotland, was informed of its defective nature, and he obtained from him a form for preparing a valid trust-conveyance of the island. On the 1st of April 1829, he executed a trust-conveyance in that form, by which he gave and disposed to the said Messrs. Thomson, Waller and Strong, as trustees, the lands and island of Shuna, for purposes similar to those set forth in the first-mentioned will. This conveyance contained also a statement regarding the money deposited in bank, in these terms:—"As the island of Shuna appeared from the public records to be greatly encumbered when I bought it from Colonel Macdonald, 5,500 *l.* of the price was retained by me, and lodged in the Royal Bank of Scotland, till the

estate was cleared of these defects in the titles. Of this sum there still remains, in the same depository, of principal and interest, about 2,000*l*. Beside clearing the incumbrances, Colonel Macdonald is under obligation to me to enter, at his expense, a new vassal with the superior, Lord Breadalbane, a new one instead of M'Lean the old one, who is still alive. This will cost Macdonald's creditors or successors a year's rent of Shuna. But the titles, that is, the incumbrances cleared, and the entry with the superior made, the notes or receipts I hold of the Royal Bank, with the interest due upon them, will become the property of Colonel Macdonald's creditors, or successors or assigns, and must be given up on delivery or discharge of my heritable bond for the balance of the price of Shuna. One of these bank notes or receipts is for 1,649*l*. 2*s*. 5*d*., and the other for 387*l*. 12*s*. 6*d*., being the interest which had accrued at the time of settling with the bank in 1826. Now, if this transaction should not be closed before my death, I have, in a separate will, which respects my property in England, directed my trustees or executors in that will to assign or indorse the notes or receipts of the Royal Bank to my said trustees, the Lord Mayor and Bailies, to be kept by them in the same depository where they now are, till the above defects are cured, and till the entry stipulated to be made with the superior is implemented; or if the latter is called for before the titles are purged, it may, with no impropriety, be taken from the sum in deposit."

About the time of executing this deed, Mr. Yates cancelled his will of the 1st of May 1828, by drawing his pen through it, and writing at the bottom of it, "Cancelled by another will, J. Y." And on the 17th of April 1829, he made a new will, containing several

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bequests and legacies to his relations, servants, &c., and referring to the above trust-deed in these terms : “ It may be proper to observe that, by a will made by me in this present month and year, I have disposed of the island of Shuna, in Argyllshire in Scotland.” And the will concludes thus : “ As to my goods and chattels, wherever situated, I give and bequeath them to the said Jacob Yates, his heirs and assigns, requesting, but not enforcing his observance of some private instructions which accompany, but are not to be considered as any part of this; hereby appointing him and his aforesaid, my sole executor and residuary legatee. It may be well to mention, that I include in this bequest my stock of cattle and other effects in Shuna, which are considerable.”

This will was signed, sealed, and declared as the last will of the testator, in presence of three witnesses, who subscribed the same. Probate of it was afterwards granted to the Appellant out of the Prerogative Court of Canterbury, and he obtained confirmation of it in Scotland, and by virtue thereof claimed the deposit in the Bank of Scotland. The trustees of Shuna also claimed this deposit under the trust disposition, and as appropriated by the deceased for the purpose of discharging the incumbrances on the island. The Leith Banking Company also claimed the deposit, and had taken proceedings by arrestment.

In these circumstances, the Bank of Scotland raised an action of multiplepoinding, stating in their summons that they were possessed of the said two principal sums of 1,649 *l.* 2*s.* 5*d.* and 387 *l.* 12*s.* 6*d.*, deposited with them by the deceased, James Yates; that these sums were claimed by Jacob Yates, the Appellant, as executor of the said James Yates, and also by the Lord Provost and Bailies of Glasgow, as

trustees, and by other parties; that they (the Bank of Scotland) were ready to pay the said sums with interest to such claimants as could show best right thereto, but as they were liable only in a single payment, it was necessary that the several claimants should be convened in process, that they may dispute their differences; therefore, &c., the said claimants, and all other persons pretending a right to the said sums, should produce the grounds of their respective claims.

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Condescendences and claims were made in this action by the Appellant, by the two sets of trustees in the trust disposition, by the Leith Banking Company, and by the representatives of a Captain Lockhart, an alleged creditor of the deceased James Yates. The Lord Ordinary, by an interlocutor dated the 17th of January 1832, decerned in favour of the trustees of Shuna. Against this interlocutor the Appellant reclaimed to the Lords of the Second Division, and their Lordships, on the 24th of May 1832, pronounced this interlocutor: They “adhere to the Lord Ordinary’s interlocutor; find the trustees of the late James Yates entitled to the fund *in medio*, and the interest that has accrued thereon, and decern, with this explanation, that the said trustees shall apply the fund *in medio*, and interest thereon, in payment of the heritable debt over the island of Shuna, held by the Leith Banking Company, upon their clearing the incumbrances on the property, and performing any other stipulations that may be incumbent on them; and remit to the Lord Ordinary to hear parties thereon, and also as to the question whether the expenses of the confirmation obtained at the instance of the claimant, Jacob Yates, as executor of the deceased James Yates, and claimed by him, should be

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paid out of the fund *in medio*; and to hear parties thereon, and do therein as he shall see cause (b)."

These two interlocutors were the subjects of the appeal.

Dr. *Lushington* and Mr. *Kenyon Parker* for the Appellant:—

The question at issue relates to the disposal of about 2,000*l.* remaining in the Bank of Scotland, and formerly belonging to Mr. Yates, the testator. The Appellant claims this sum under the testator's last will, dated 17th April 1829; the Shuna trustees claim it either as bequeathed to them by the deceased, or as appropriated and destined by him for redeeming the incumbrance on that estate; the Leith Bank claimed the sum, either as appropriated for payment of the debt due to them under the bond and security assigned to them by Colonel Macdonald, or as attached by an arrestment, which they had used. Captain Lockhart's representatives also appeared in the multiplepoinding, claiming merely as ordinary creditors of the deceased; but these are not parties to the appeal. The trustees of Shuna and the Leith Bank are Respondents in the same interest.

In considering the question raised, two points require attention: 1st, What would be the rights of the parties under the general terms and effect of the deeds and wills, independent of any special bequest or direction regarding the money deposited in Bank? 2dly, Whether any such special bequest or direction subsisted at the testator's death, or formed part of the settlement of his succession, as to supersede the general rule of law on the subject? On the first point of this inquiry there is no difficulty; for, on the one

(b) See report, 10 Shaw, D. & B. 565.

hand, it is clear that the testator's last will of the 17th April 1829, bequeathing to the Appellant his "goods and chattels wherever situated," and appointing him his sole executor and residuary legatee, followed by administration in England and confirmation in Scotland, is sufficient to vest in the Appellant all the testator's funds and money, whether in England or Scotland, and in particular the sum deposited in a bank upon an ordinary receipt; the testator being domiciled in England, where also his will was made, it must be construed by the law of England. On the other hand, it is equally clear, that, by disposing to trustees the lands and island of Shuna, burdened with a debt which was declared to be a heritable lien or real charge on the lands, the testator gave to them the lands *cum suo onere*—with every incumbrance of a real nature attaching to them. The Appellant, as executor, could never be called on to pay out of the moveable funds a debt which had been made heritable over these lands, in the person of the testator himself. Stair, b. 3, tit. 5, sect. 17, and tit. 8, sect. 65; Erskine, b. 3, tit. 8, sect. 52, and tit. 9, sect. 48; *Clayton v. Lowthian* (b). No proposition can be clearer than that an heir, or *mortis causâ* disponee in Scotland, succeeding to an encumbered estate, must take it with all its burdens.

The next inquiry is, whether any such special bequest or direction subsisted at the testator's death as to supersede the general rule of law on the subject. There are two ways in which it may be contended that the money deposited was set aside for the relief of the Shuna trustees; *first*, that the testator by destination or the expression of a testamentary intention, devoted this money for that purpose; or, *secondly*,

(b) 2 Wils. & Shaw, 40.

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that the money was appropriated for payment of the Shuna debt, not merely by the ultimate intention of the testator, but by some previous agreement with third parties, creating a vested interest in this deposit. But these two grounds are distinct and independent of each other. The question of testamentary disposal is different from an agreement *inter vivos*; the two views ought not to be mixed up together, but ought to be separately examined; and if it appear on such an examination that neither of them singly is well founded, it will not be possible to support the interlocutors appealed from, by endeavouring to blend them together. If there was neither a clear appropriation of this fund as *inter vivos*, nor a clear destination of it *mortis causâ*, it would be impossible to make a third ground for depriving the Appellant of his rights, out of these two inadequate and defective views.

With respect to the first question, whether in the testamentary deeds there is an effectual destination of the deposit in favour of the Shuna trustees, to the exclusion of the executor and residuary legatee, supposing that at one time Mr. Yates harboured the intention of giving this money for the benefit of the trustees, and that such intention had been effectually expressed, it cannot be doubted that it was competent for him to alter that intention. It is equally clear, on the other hand, that if he ever had any such intention, it was *de facto* recalled by him, and that the result of his last will is to leave this part of his succession to rest upon the ordinary principles of law, and to devolve on the Appellant as part of the personal estate. The will of 15th April 1828, which destined the fund, was wholly superseded by subsequent deeds. That will contained a devise of the

island of Shuna, but as that devise was found to be insufficient, by the law of Scotland, to carry heritable property, a new deed was framed by the testator, and by that deed the whole provisions of the first will were virtually cancelled. It is impossible to look at the will of 15th April 1828, and the trust disposition of 1st April 1829, without being satisfied that none of the provisions of the first are to be considered as subsisting, except in so far as they are repeated in the second, and that, where any of the provisions have in the second deed been altered or modified in form or substance, the terms of the second deed are to be taken as the rule.

The deed of 1st May 1828 requires no comment, because it was actually cancelled by the testator, and was marked "cancelled by another will," which could be no other than the will of 17th April 1829, in favour of the Appellant, leaving him the testator's whole goods and chattels, and appointing him sole executor and residuary legatee. This and the trust disposition of the 1st of April 1829 are the only subsisting deeds. The latter was mainly intended as a conveyance of the island of Shuna, and as a description of the purposes to which it was to be applied. The subject of the deposited money is introduced incidentally, "As the island of Shuna appeared from the public records," &c. (c). Upon well considering this passage, no one can say that it contains a substantive or direct bequest of the deposited money, or that the disposal of it was intended to be regulated by that deed; it is mentioned merely by relation to another will, the terms of which can alone be considered the testator's ultimate declaration of his intention upon

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(c) See the extract, *ante*, p. 550.

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the subject; reference to the separate will cannot be considered of itself as determining the testator's final intentions, if that will is either differently expressed or has been recalled, and if the testator's last will of all contains no such provision.

It is clear that the testator in that passage refers to the will of 1st May 1828, which is the only previous will respecting his property in England, and which, in all probability, was subsisting when the trust disposition of the 1st of April was executed. On the 17th of April 1829 the testator executed another will, containing the ultimate declaration of his intentions as to his English property, and as to his personal funds generally. It was then most probably that the will of the 1st of May 1828 was cancelled. In so far as regards the last will (of 17th April 1829), it is all in favour of the Appellant's pleas; it gives him the whole goods and chattels of the testator, wherever situated, appoints him sole executor and residuary legatee, and subjects him to payment of certain bequests, but it contains no provisions as to the deposited money. It does not, as pointed at in the trust disposition (of the 1st of April 1829), direct the executor to assign or indorse the notes or receipts of the bank to the trustees, nor does it qualify the general bequest in the Appellant's favour, by any condition or exception on the subject. It is submitted, therefore, that under the last will the Appellant takes all the testator's moveable property, including the fund in dispute, subject only to the legacies therein mentioned, and free from any obligation to indorse or assign the receipts. The Respondents cannot claim this part of the succession under the will of 15th April 1828, because that was entirely superseded by the trust disposition of 1st April 1829. They cannot

claim it under the will of 1st May 1828, because that was actually cancelled. They cannot claim it under the trust disposition of 1st of April 1829, because that merely refers to a separate will, which is cancelled, and the directions therein given to the executors are consequently revoked, and the executors themselves are superseded; and they cannot claim it under the last will of 17th April 1829, because by that will all former settlements of the testator's goods and chattels and of all his moveable property are virtually recalled, and they are bequeathed to the Appellant without restriction or exception.

The next question is, whether there was any previous arrangement or agreement *inter vivos* as to the appropriation of this money for the redemption of the debt and *lien* over Shuna. There could be no agreement of that sort between the testator and the Shuna trustees, because their interest in the succession was altogether *mortis causâ*, and of a revocable nature. There were no other parties, except the Leith Bank, with whom any agreement of appropriation could effectually be made, and the whole case shows that there never was, as between the testator and the Leith Bank, a concluded agreement for appropriating this fund. Mr. Yates at first deposited the money in bank, in the hope that it would lead to an immediate discharge of the incumbrances on Shuna, or would stop the currency of legal interest upon the debt. But the Leith Bank never closed with that proposition, and never recognised the deposit as affecting them, or made for their behoof. If they were to have the same general claim as before, for principal and interest of the assigned bond and lien, and were not bound on their part to recognise the deposit, there could not be any obligation as against Mr. Yates, and

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the deposit must be looked on as an *ex-parte* operation; and that such was truly the state of the case, is manifest from the steps taken by the Leith Bank in the action and diligence raised by them after Mr. Yates's death. The mode also in which the testator himself dealt with this money, demonstrates that it was not considered as definitely appropriated under any binding agreement with the Leith Bank: the money had been deposited in 1819, in the name of Mr. Rose, in *trust for*, and *to be under the direction of Mr. Yates*, and, from beginning to end of the transaction, the Leith Bank directors were never parties to the deposit. The risk was with Mr. Yates; if the Bank of Scotland holding the money had failed, he alone must have suffered the loss. As a consequence of the same view, the claim of the Leith Bank was in no way restricted to the fund deposited. Supposing that Mr. Yates had become insolvent before his death, the Leith Bank could not set up such vested interest in the money deposited as would have enabled them to compete preferably with his general creditors; or, supposing that any claims had arisen to the Bank of Scotland against Mr. Yates, it is obvious that they would have been entitled to retain the money deposited with them after the receipts were taken in his own name, in payment or security of their claims. Again, supposing that the creditor on the bond and real lien had not been a banking company, but an individual, it is clear that the debt in his person so secured over Shuna would have been heritable, and would descend on the heir, and not on the executor of the debtor. Supposing, finally, that the Leith Bank were to be considered as entitled to preference on the fund *in medio*, in virtue of their arrestment, the Appellant would be entitled to receive an assignation of their

debt and security, and to keep it up and enforce it as a real charge or burden on the estate of Shuna, in the hands of the trustees and all others.

Apprehending that the Respondents would rely on the judgment moved by Lord Gifford, in the case of *Earl of Minto v. Elliott* (*d*), the learned counsel cited it, and distinguished it from this case; and in support of their own argument on the construction of the will, they referred to the cases of *Hog v. Lashley* (*e*), *Stanley v. Bernes* (*f*), *Anstruther v. Chalmers* (*g*).

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*The Lord Advocate* (Mr. Murray), and Mr. *James Parker*, for the Respondents:—

The points for consideration are, first, What was the intention of the testator? Secondly, How far has he succeeded in the legal execution of his intention? On the first question there can be no doubt. The whole of the testator's conduct, in every circumstance connected with the disputed fund, clearly shows that it never, at any moment, was his intention to bestow that fund on the Appellant; but that, on the contrary, it was his settled determination throughout, that it should be employed in the disincumbrance of his property of Shuna. The letter which his agent, Mr. Pearson, addressed to Mr Kerr, who represented the Leith Bank, is a document of much importance; and bearing date the very day after the stipulated term of payment, it proves that the postponement of payment took place in spite of Mr. Yates, and not in furtherance directly or indirectly of any object or intention of his. This letter is further of importance, as proving that the consignment of the deposit was with the full cognizance of the Leith Bank, then representing Mr.

(*d*) 1 Wils. & S. 678.

(*f*) 3 Haggard, 373.

(*e*) 6 Bro. P. C. 577.

(*g*) 2 Sim. 1.

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Macdonald in the character of creditor, and under express notice, that, as the fault of non-payment lay with them, Mr. Yates was thenceforth to be liable in no more than bank interest. The money, as it lay in the bank, was to be dealt with as the money of the creditor, to remain deposited only until the creditor, by fulfilling his obligations, should put himself in condition to uplift it. From this letter it appears, that the Leith Bank had for some time previous been in communication with Mr. Pearson, who thus writes, "Agreeably to what I stated to you, I wrote to Mr. Rose, and communicated to him your wish," &c. (*h*).

The Leith Bank at last obtained a discharge of a portion of the incumbrances on the estate of Shuna, and availing themselves of Mr. Pearson's readiness to pay any sum to account on a proper discharge, they applied for and obtained 4,000 *l.* of the deposited fund, which was the amount of the incumbrances then extinguished, and they could then have obtained the whole deposit had they been in a condition to produce discharges of the whole incumbrances.

It is impossible to peruse the will of the 15th April 1828, without being satisfied that it was the testator's intention to vest the island in his trustees, free from every burden. It was not his interest in the island, subject to the reserved burden of a considerable portion of its price, but the whole and entire property of the island that was meant to be conveyed, and a perfect freedom from incumbrances was implied in the very purposes of the trust. Any doubt on this head is completely removed by referring to the special clause, respecting the consigned money: "As the island of Shuna," &c. (*i*). The second testamentary

(*h*) See the letter, *ante*, p. 546.

(*i*) See the clause, *ante*, p. 549.

deed, executed by Mr. Yates on the 1st of May 1828, distinctly following up the intent of the first, conveyed his whole remaining estate to two of the three individuals whom he had already appointed trustees under the first deed. In so far, therefore, as these two deeds are to be read separately, it is plain that it is under the first, and not under the second, that the testator disposed of Shuna and of the deposit of money now in dispute. As however the two deeds have relation to each other, and between them embody a universal conveyance of the whole estate belonging to the testator, they may properly be read together, as constituting but one settlement. But it is clear, whether they are read together or separately, that the deposited money is dealt with as a special bequest in favour of the Respondents, and not intended to form part of the residuary estate under the second deed. The words of the residuary bequest are, "I give and bequeath all my chattels and effects of whatever nature to Jacob Yates," &c., "together with the life-rent of all my lands and houses in the above parishes and other places, except the island of Shuna, in Argyllshire, which I have otherwise disposed of," &c. The present question, therefore, could never have arisen if there had been no other deeds beyond the two that have now been noticed.

The question then comes to be, whether Mr. Yates having once unquestionably conferred upon the Respondents a right to the deposited money, and having in direct terms excluded the residuary legatee from all right to that fund, did afterwards change his mind as to the disposal of this portion of his property? It is an undoubted fact in the case, that Mr. Yates never cancelled or revoked his first will, (of the 15th of April 1828). In consequence of some hints

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dropped in a correspondence between him and Mr. Thomson, one of his intended trustees, he entertained doubts how far that deed might be technically sufficient by the law of Scotland to carry heritage situate there. He in fact never considered the deposited fund as forming any part of his own estate. He looked upon it as money set apart for Colonel Macdonald, from whom he had purchased Shuna, and for the Leith Banking Company which had come in his place. In a letter of the 28th May 1827, he says, "There is 1,500 *l.*, with several years' interest, lying in my name, in the Bank of Scotland, till certain defects in the title deeds of Shuna are removed. The Leith Bank have an assignment of the sum, and it is odd that though only three per cent. is allowed on the deposit, they seem to be careless about the business," &c. Again, on the 23d of January 1828, he writes, "There is likely to be litigation between the trustees of Colonel Macdonald and the Leith Bank, with respect to the part of the purchase-money which is deposited with the Bank of Scotland," &c.

But the new deeds which Mr. Yates executed, require no external aid from presumptive circumstances to show that they were no ways intended either to cut down the interests conferred upon the Respondents, or to enlarge the only interest which the original deeds had conferred on the Appellant. In the deed of the 1st of April 1829 is this passage: "As the island of Shuna appeared," &c. (*j*). The only other deed which he executed, was the will of 17th of April 1829. Can it be pretended that within this short interval of 16 days between the two deeds, Mr. Yates changed his mind, upon a matter which had

(*j*) See the extract, *ante*, p. 550.

been the favourite scheme of his life? There is not a vestige of evidence that he did. One most important feature in this deed, as in all the other deeds, is, that it contains no express words of revocation, applicable to any of the former deeds, and therefore, in so far as it is not absolutely irreconcilable with these deeds, it must be construed in conformity with them. But not only does it not contain any words of express revocation, but it contains words of positive recognition; thus it says, "It may be proper to observe, that by a will made by me in this present month and year, I have disposed of the island of Shuna, in Argyllshire, Scotland." The only clause from first to last of all the four deeds which affords the Appellant the slightest pretence for maintaining his present claim, is the following, which is contained in the last deed, "As to my goods and chattels, wherever situated, I give and bequeath them to the said Jacob Yates, his heirs and assigns, requesting," &c. (k). Is this general bequest of residue to destroy the special destination of a specific fund which had already been fixed by another deed, executed but a few days before, and expressly referred to and recognised in the very deed which bequeaths the residue? Revocation is never to be presumed, except where the deeds are such that they cannot possibly stand together, which most assuredly is not the case here. But the words of residuary bequest do not stand alone; they are immediately followed up by this explanatory clause: "It may be well to mention, that I include in this bequest, my stock of cattle and other effects in Shuna, which are considerable," &c. (l).

The Respondents submit, in the first place, that the

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(k) See this passage, *ante*, p. 552.

(l) See the extract, *ante*, *ibid*.

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fund belongs to them by express and positive bequest, under those words in the deed of 15th April 1828:—  
“My will is, that after my decease these notes or receipts shall become the property of my trustees, the magistracy of Glasgow.” That bequest stands unrevoked. The trust disposition of 1st April 1829, indeed, again touches on the same matter, but there is nothing incompatible in the two deeds to prevent their standing together; if the second should be thought to labour under any ambiguity, the first may be made use of to explain it. The deed of 17th April 1829, on which the Appellant more immediately founds, contains nothing which could by possibility detract from the previous special bequest. Throwing aside the deed of 1st April 1829, and taking the deeds of 15th April 1828 and of 17th April 1829, as the only subsisting settlements, the Respondents submit that there is nothing in the general residuary bequest contained in the latter, which can in any respect destroy the specific disposal of the deposited fund contained in the former. A bequest of residue necessarily implies, that it can only come into operation after all special bequests shall have received their full effect.

The Respondents have in the next place to submit, that even though there should be held to be no direct bequest of the deposited money in their favour, there is such a plain appropriation and destination of it for their benefit, in the setting of it apart for the discharge and extinction of the unpaid balance of the price of Shuna, as completely to take it out of the residuary portion of the estate, and to entitle the Respondents to insist that it shall be applied to the special end for which the testator had thus destined it. Had there been no testamentary deeds whatever, and had the question arisen between the heir and

executor of Mr. Yates dying intestate, the Respondents would still contend that the very peculiar destination which exists as to this deposited money, would have entitled the heir-at-law to have insisted upon its being applied in extinction of the price of Shuna. Stair, B. 3. tit. 1. sect. 4; *Traquair v. Blushiels* (m), *Aikman v. Heirs, &c. of Boyd* (n), *Earl of Minto v. Elliott* (o), *Waugh v. Jamieson* (p); Ersk. B. 3, tit. 8, sect. 17 & 18.

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But the Appellant may object that these authorities proceed upon the footing that the price, in payment of which the executor was subjected, had not been constituted, by reservation or otherwise, a real burden on the land; and that wherever a real burden has been created, it is the heir, and not the executor, who is left to clear off that burden. It is quite true, that in the ordinary case, where the price is converted into a real burden at the instance and for the ends of the purchaser, the objection would be well founded, because it is by his own act and will that the liability is converted from a personal obligation into a real right. But in this case the postponed payment of the price was not rendered necessary from any fault of Mr. Yates's; it arose from the incapacity of the seller to give an unincumbered title. Mr. Yates's anxiety and wish was to pay the price and be quit of his money, but the seller was not equally ready. From the moment that the fund has been actually placed in deposit, or consigned in bank, and set apart from the debtor's other estate, with a view to such payment and extinction, the fund becomes heritable *destinatione*; the executor, if the original debtor dies whilst the money remains in this situation, is not entitled to

(m) Morr. 3591 and 11337.

(o) 1 Wils. & S. 678.

(n) Id. 11347.

(p) Morr. 5453.

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demand it as a portion of the testator's assets, but on the contrary, the heir who would have benefited by the payment, if the creditor's refusal or incapacity to receive payment had not rendered consignation unavoidable, is entitled to insist that he shall not be deprived of this benefit through the act of the creditor, but that the deposited fund shall be applied to the purposes for which, from the moment of its deposit, it had been destined; viz., the payment and extinction of that heritable debt which would otherwise fall a burden upon him as heir. The consignation of the deposit in this case was in all other respects equivalent to payment.

If such, therefore, would have been the Appellant's predicament in a competition with the heir-at-law, upon the mere abstract principle of destination, without any aid from the express declaration of the testator's intention contained in his testamentary deeds, how, under the infinitely more favourable circumstances which support the Respondent's case, can he maintain his claim to the deposited money which here forms the fund? The destination of that fund appears, not merely from the indicated purpose of paying off the balance of price due to those in the right of Colonel Macdonald; not merely from the actual tender of payment, which is proved to have been made at the stipulated term of Candlemas 1819; not merely from the consignation of the money on the creditors' failure to accept of this tender; not merely from the subsequent payment to account out of the deposited fund, which the same creditor afterwards accepted of and discharged; but from the total separation which, for upwards of ten years, was made between the deposited money and the deceased's other estate; from the cessation to pay interest upon

the debt to the creditor during the whole of this period of deposit ; from the express notice given to the creditor, that he must be content with such interest as the bank in deposit might give ; from the tacit acquiescence of the creditor in the notification thus given ; and, above all, from the reiterated, express declarations of purpose contained in the first, as in the last, of the deceased's testamentary deeds ; that this fund was " to be kept by his trustees, in the same depository where it now is, till the defects in the title of Shuna are cured : " and that upon that event, and upon all encumbrances being cleared, then,—so far from being handed over to the Appellant, either as residuary legatee or as executor,—the deposited money and " the notes or receipts I hold of the Royal Bank, with the interest due upon them, will become the property of Colonel Macdonald's creditors or assigns, and must be given up, on delivery or discharge of my heritable bond for the balance of the price of Shuna."

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Lord *Brougham*, in the course of the arguments for the Appellant, made the following observations :—In England we should have some difficulty in admitting the wills in evidence,—I do not know how the practice is in Scotland,—how could any Court before which this question should have arisen have access to those two instruments? By the laws of evidence in England, where the personalty is in question, you cannot produce the will itself for any purpose of a civil action, and prove the testator's handwriting by the attesting witnesses ; that could not be given in evidence ; it could not get to the Court ; the only evidence is the probate, unless on certain issues, such as a question of sanity, for instance, or a collateral question ; but for no testa-

By the law of evidence in England, a will is not admissible in evidence in an action regarding the testator's personal estate ; the only evidence is the probate.

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mentary purpose, as I apprehend, could the will itself be produced. I do not say that is the Scotch law of evidence. But it does not follow that the case is to be decided by English law; it may be that the Scotch Courts, acting as Scotch Courts with respect to Scotch property, must decide by the Scotch law. These are feelers by which they are to arrive at their point, though the general principle would be that the English law is to prevail.

[Dr. *Lushington*.—I submit that the will of a person domiciled in England, made according to the law of England, governs the distribution of the testator's personal estate all over the world: *Anstruther v. Chalmers* (q).]

Lord *Brougham*.—The law of England must be looked to for the *lex domicilii*, for the construction as well as the effect of a will, and Sir *John Leach*'s decision in *Anstruther v. Chalmers* would be a grave authority to show it was so; but, as this was a Scotch estate, it might be a question, under the law of Scotland, whether, in construing an English-made instrument, though the party was a domiciled Englishman, upon a personal matter you were not to look to the rules of the law of Scotland. I feel some difficulty as to that question; the law of Scotland knows nothing of ordinary executory devises; they have one chapter that comes near them—the doctrine of list deliveries on general failure of issue; but the subtleties of our law of executory devises they know nothing of; it is one of the nicest points in the English law, upon the effect of all those 64 cases often mentioned in Lord *Thurlow*'s

time; and I asked Mr. Preston a few days ago how many more he could show me, and he said 140. A domiciled Englishman in England making an English will, according to your present contention, the Scotch Courts must construe that English will according to the English law; but supposing he limits a chattel personal, say some bank stock made personal chattel by Act of Parliament, upon a general failure of issue, that is to say, to *A. B.*, and, according to the English law, I will say with remainder to *C. D.*,—the Scotch would say, “whom failing;”—and if *C. D.* should die without issue, or without children, then over to *E. F.*, the English law would then raise this question, must it be to *C. D.* dying without issue generally, or must the bequest, in order to vest, be given over to *E. F.*, if *C. D.* dies without having issue living at the time of his death: and then you go into all the general learning, to show whether it is a general or a special failure of issue; in the one case an executory devise would be good, in the other bad.

I am inclined to think, in the first place, if you read these words, without going out of the four corners of this paper and without looking into the cancelled will, it contains a sufficient indication and a declaration that will do: “Now, if this transaction should not be closed before my death, I have, in a separate will, which respects my property in England, directed my trustees or executors in that will” what they shall do. Supposing it had been so, that would raise a question whether you had a right to travel out of this instrument, and to look at the unproved or cancelled will. But it is no such thing; the deed says, “to assign or indorse the notes or receipts of the Royal Bank to my said trustees.” (His Lordship having read the passage as in p. 551, *ante*, proceeded to observe.) They will contend,

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If a testator recites that he has in the first part of his will given such an estate to A., that estate passes to A. though no such gift is in the will.

on the other side, that this is a sufficient *testamenti dictio* without travelling out of this deed into the cancelled will; and that they do not require the cancelled words. In cases with respect to property in England, it has been held, that reciting and referring to a thing as done is sufficient, though it was never done. If a man says, "I have, in the first part of my will, given such an estate to A.," A. shall have that estate, though the gift is not contained in the first part of the will.

[Dr. *Lushington*.—But the persons appointed to do the act are the executors mentioned in that instrument, and can your Lordship doubt, that if the testator cancelled that very thing which appoints them, it all falls to the ground?]

Lord *Brougham*.—I will tell you my idea of that. If by a valid subsisting will admitted to probate, a man gives 1,000 *l.* to A. B., whom he has appointed his executor in his former will, and if he, the next day after he has executed that instrument, cancels the will by which he appointed A. B. his executor, no man can doubt that, under the subsisting will, A. B. would take the 1,000 *l.* Suppose A. B. is not mentioned, but the testator says, "I hereby give the person whom I have appointed my executor in my will, made on such a day, 1,000 *l.*," and next day he revokes or cancels that will. May you look into such a will for the purpose of seeing who the person is? For that raises the question to which we must come in this case, and it is a very important one; and it never has been decided yet, either in this country or in Scotland, that if the law of the country where the testator lives and dies (his *lex domicilii*) is to regulate the disposition of his personal property under the will, that

law is also to regulate the construction of the will, which is one difficulty. That point has never been decided, and I have very great doubt about it, namely, whether the Judges in Scotland must not only take the English law as their guide in the construction of the will, and in working out what was the intention of the testator, but whether they must also take the technical rules of the English law as to evidence in getting to the case in the Scotch Court: that is what you have got to combat; and I have great doubts about it. I must say, though I incline to the opinion of the Judges of the Court below, still I am very far from thinking it so very clear a case, because the points are raised for the first time, viz. first, whether the English rule of construction is to be applied; and, secondly, whether the English rule of evidence is to be applied? Both those questions are distinctly raised and we must decide them; we cannot travel to a decision here without deciding those questions, and yet the Judges below never seem to have said a word about them. Could the appropriation not have been effected by the testator himself in his lifetime?

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[Dr. *Lushington*.—I mean to establish before your Lordships, on the authority of the case of *Lord Minto v. Elliott*, that it could not; for, in order to make a valid appropriation during the party's lifetime, there must be an interest created in some third party.—He read extracts from the judgments of Lord Giffard, in the case just cited, and of Chief Baron Alexander, in *Gaskell v. Gaskell* (r).]

Lord *Brougham*.—The reason why they talk of a testamentary deed in Scotland is this: By a testament

(r) 2 You. & J. 502. 510.

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in Scotland you cannot convey a real estate or touch it at all; it must be by deed *inter vivos*, but then there is in Scotland the seal; there is no difference between simple contract and bond debts, consequently they do not talk of a deed as we do. By a deed, they mean an instrument under seal; a will does not require a seal, a deed does.

His *Lordship* further said in the course of the arguments for the Respondents: I take the case to consist of two branches, the one is the question of evidence of English instruments, and the Scotch Courts dealing with them in two ways; the other is the appropriation. Perhaps you, my Lord Advocate, do not mean to deny, nor does, I suppose, Dr. Lushington on his part mean to deny, that his case might stand on the second ground, that of appropriation, whichever way the first is disposed of? You have two points whichever way we decide; the first point is the one I wish particularly to call my Lord Advocate's attention to, and that is,—you have to show, though I think you may assume, that the law of domicile is to govern the decision—then two questions arise in applying that principle; are you to take the construction which the English law would put upon the instrument, or are you to come at the construction by the Scotch law principle? That is the first question, and upon that question I am inclined to think that it is the English law that is to govern. The second is a different question, whether or not the English or the Scotch law of evidence is to regulate the admission or rejection of certain evidence in this case. We are putting the two points on the true ground, whether the one law or the other is to be the governing rule. Again, supposing it is decided that the Scotch law

is to govern, you are to satisfy me that by the Scotch law, regard being had to the confirmation and the proceedings there, you have a right to avail yourselves of them. Then comes the question of appropriation kept apart from the other two. That seems to me to be the scheme of the argument. It is not merely a technical matter, but a very substantial matter, for it is whether it is the man's last will or not; the question raised on admitting a paper to probate is, whether it is testamentary or not? He may have one will which is a testamentary paper and not revoked by the last will, but he may also have a paper which ceased to be his will, because he has made his last will. A man may have two wills, but he cannot have two last wills. How you can ever make this out to be a subsisting will, my Lord Advocate, I cannot say. This, I take upon me to say, would never be admitted to probate in England—I mean the former will of April 1828.

The question is, whether an English rule of evidence is to be applied, or a Scotch rule of evidence. By the law of England, if a man makes a will written all with his own hand, and bequeaths 1,000 *l.* to one and 1,000 *l.* to another, and the residue to a third, and signs it with his own hand, and it is in every respect in the form of a will according to the English law as it at present stands,—in short, suppose he makes such a will as would be admitted to probate, suppose it to have been proved as his last will at Doctors Commons; then suppose any person gets possession of that will (which ought to have been regularly filed at Doctors Commons) by spoliation or by negligence of the officer in bringing it down, which he may be compelled to do by a subpoena *duces tecum*,—suppose you bring down that original will and produce it at York, at *nisi prius*, and even prove it was out of Doctors Commons and

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in the custody of the proper officer; what you would think of that in Scotland would be, that it would be the most perfect proof of the instrument, yet by the rules of evidence in England, it cannot be received at *nisi prius*, and the party would be nonsuited, or have a verdict passed against him if he did not choose to be nonsuited, if he had not another instrument, and if he only produced the original will. By our rules of evidence he must produce the probate, which is a sentence of a Court of competent jurisdiction declaring that to be the will; that is the probate without the will, but with a copy of the will, so that that is a case in which a copy is evidence and not the original. It is the sentence of a Court, and proves itself under the seal of the Court. Now, if that be so in the case of a will which has had probate, how much more is it the case where you produce a will which never has had probate, consequently a Court and Jury here, or a Court of Equity, never could look at that instrument, it is the probate alone that lets it in *quasi* will. They might see it for other purposes, as in a question of forgery, or they might see it if it were referred to in another instrument, or in a question of sanity. Now that is the law here; and this being the case of a domiciled Englishman, is the law here to be the governing rule as to the admissibility of evidence in Scotland, where the action is brought?

I will state to you my only difficulty and see whether you can help me over it, because I agree with you, generally speaking, that the *lex loci domicilii* is not applicable to the course of procedure; that the Court is to proceed by its own course of procedure, the law of the Court being the course of the Court, and consequently I am inclined to think that the admission of evidence being rather matter of procedure than a substantial matter of law, it is to be governed by the law

of the country where the Court sits. But then in all questions of jurisprudence it is easy to say how things are here and there, when there is a very great difference between the points; but when you come to the confines, and when the one province runs into the other, then arises the difficulty and then we get *inter apices juris*. Here is a case which partakes of the nature of the law of evidence and also of the substance of the weightier matter of law. I will put the case I have already hinted at; suppose the English law were to change, as it is now in the course of changing, and that no will of personalty could henceforth be valid unless it was attested by two witnesses. Now observe, an Englishman domiciled in England makes his will touching Scotch property; *mobilia sequuntur personam*, and therefore the *lex loci* of England prevails. You go into a Court of Scotland and tender the will, in order to get, by the rules of the English law, possession of the fund; the Scotch Court says, "willingly you shall have it; whoever would get it in England shall get it here, whether it would be the same person our law would give it to or no, because the English law is to govern, but," says the Court, "let us look at the will." The will is produced, it has only one witness or no witness at all, then the Court says, "this is no will, it would not in England be held to pass the property to any human being. The law has said, that in order to pass property, to extend after a man's death the right that he has to his chattels during his lifetime, which is not a natural right but entirely conventional, he must have complied with the formality of two witnesses attesting it." Now, my Lord Advocate, how would you deal with that matter? Would it be by the English or the Scotch law? because if it be by the Scotch law there is a great difficulty, which is neither more nor less than

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this, that Englishmen would acquire personal property by the English law, though that property was only attached by a will executed without complying with the formality of that law; that is the difficulty.

The Counsel for the Respondents proceeded, and with a view of showing that their Lordships, sitting as a Court of Appeal on Scotch law, might look to the will without reference to probate, and for the general purposes of their argument, they cited *Ersk. B. 2, tit. 3, sect. 14, In re Ewin (s), Attorney-general v. Dimond (t), Earl Minto v. Elliott (u)*.

Dr. *Lushington*, in his reply, was arguing that their Lordships could not look to the instrument as a testamentary act—

Lord *Brougham*.—I admit that no probate could be had of any but the second will, in England. It does not, however, follow that the Scotch Court may not look at both instruments; at that which has not probate, as well as at that which has. That Court will give faith to what has been sanctioned by a Court of competent jurisdiction, but it does not follow that, upon a matter in which no Court has exercised any judgment, the Scotch Court would reject that matter because it was not proved in an English Court, if it is not contrary to the rules of evidence, and to the practice of the Scotch Court, to receive it. It is going too far to suppose the Scotch Court would say, “if this instrument had been offered to an English Court it would not be admitted, and we therefore reject it.” Do you think, my Lord Advocate, you can for your argument throw overboard the first will of 1828? Could you rely safely on the passage in the deed of

(s) 1 *Cromp. & J.* 151.

(t) *Id.* 356.

(u) 1 *Wils. & S.* 678.

the 1st of April 1829? "Now, if this transaction should not be closed before my death, I have in a separate will which respects my property in England, directed my trustees or executors in that will, to assign or indorse the notes or receipts of the Royal Bank to my said trustees, the lord mayor and bailies, to be kept by them in the same depository where they now are till the above defects are cured." Would that sustain your argument without the first will? This is a subsisting trust deed, a conveyance *inter vivos*, operative at this moment. I mean your argument respecting the appropriation; does it require no other aid, and can it stand without the first will of 1828, as well as without the cancelled will? [*The Lord Advocate*.—Certainly; I apprehend it is quite sufficient, if a person declares "I deposit this money," meaning it should be paid for a certain debt.] Lord *Brougham*.—Suppose now, Dr. Lushington, there had been a will, not proved in Scotland, but a will which by the law of Scotland, for want of two witnesses (a will of personalty), could not be admitted to probate there, and suppose probate had been sought of that will here, would probate be refused here for want of two witnesses?

Dr. *Lushington*.—Decidedly; the case of *Stanley v. Bernes* (x) is one in point.

Lord *Brougham*, after the arguments were closed, said:—My Lords, another reason,—besides the importance of the matter,—for which I wish to postpone the further consideration of this question, is, that though the subject is of great importance, and some parts of it are not without difficulty—though undeniably the

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(x) 3 Hagg. 373.



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decision, if pronounced, will be for the first time pronounced in this House upon those points—though undeniably also the decision upon the same points in the Court below has been pronounced for the first time in any Court of England or of Scotland—though, therefore, these points are matters of first impression, yet in this case I desiderate that which is a great help to any Court of Review dealing with the judgment of a Court below, brought before it by appeal—I desiderate the reasons of the learned Judges who pronounced the decision in the Court below. I find four learned Judges have given their opinions, but not one of them has given one tittle of reason for his opinion. The question that arises here, and which brings the laws of the two countries into conflict, is this first and general question: Shall the Scotch practice or the English practice respecting the law of evidence, as well as the Scotch principle or the English principle in respect of the construction of the instrument, prevail as the governing rule in this case? That is the first and general question, and for solution of that question one should look to the opinions of learned Judges and for their reasons, to know the view which they take of so important a matter. But that is not the only question; there is another and much more material one; and that is one upon which above all things it is material to know the views of the Scotch Judges.—Granting that the Scotch law is to prevail in construing the instrument, and the Scotch practice also in admitting or rejecting evidence, what is the Scotch practice, and what is the Scotch law; the Scotch law respecting construction of instruments, and the Scotch practice respecting the admission or rejection of evidence? I desiderate the authority, the authentic and consequently the

most valuable statement which can be had as to what is the Scotch law and practice, but particularly the Scotch practice as to admitting or rejecting evidence. I desiderate that the more, because one wishes to know how these things are dealt with in the Scotch Courts, and to see exactly what the difference is, and upon the highest authority, between the Scotch and the English Courts in the administration of the important law of evidence. Unfortunately we are left without any light from that quarter, from which above all others I should wish to receive it, and that is an additional reason for wishing your Lordships to postpone the further consideration of this case.

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Lord *Brougham*.—My Lords, the question which I considered it right to give reasons upon in this case, relates rather to the first than to the second part of the subject as taken in the order of the argument at the bar—to the manner in which the instruments, executed in England by a domiciled Englishman, are to be construed and dealt with in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of Scotland, rather than to the question of valid or effectual appropriation.

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James Yates, merchant in London, and residing always in England, had purchased the island of Shuna, one of the Hebrides, at the price of 10,500 *l.*, of which 5,500 *l.* was, by agreement, left as a burden upon the estate. The transaction took place in 1815, and at Candlemas 1819 the remaining part of the price was to be paid, the parties having no doubt of the seller being able before that time to clear off the incumbrances affecting the estate. Meanwhile an heritable bond was granted for the 5,500*l.*, and was

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duly recorded, so as to constitute an effectual lien on the estate by the laws of Scotland. At the stipulated period, (the 2d February 1819,) payment of the bond was tendered, but the seller was still unable to give a clear title, and Mr. Yates accordingly consigned the money with the Bank of Scotland. Before this period the rights of the vendor had been transferred to the Leith Banking Company, to whom accordingly Mr. Yates's agents gave notice of the consignment, in order that their client might be relieved from any claim of interest after the consignment was notified. The Bank Company acted upon this notice; for Mr. Yates having intimated to them that they might draw out a sum of the deposit equal to the debts upon the estate which they should pay off and produce discharges for, they actually paid off 4,000*l.*, or at least produced discharges to that amount, and received so much of the fund out of the Bank of Scotland, leaving only 1,649*l.* 2*s.* 5*d.*, the balance still deposited, and now in dispute, together with the sum of 387*l.* 2*s.* 6*d.* interest. The deposit had originally been made in the name of Mr. Rose, as a kind of trustee or stakeholder for all parties, but in August 1826 it was, at Mr. Rose's desire, transferred to Mr. Yates's own name. The whole course of the transaction, as I have stated it from the facts admitted on all hands, plainly shows Mr. Yates's desire from the beginning to finish the affair, to pay the price, and to receive the titles of the estate, and his intention of keeping this business apart from his general concerns; nor can anything be more contrary to probability than the supposition that he should allow it to be mixed up with the arrangement of his affairs, and to influence the testamentary disposition of his property.

With this strong probability arising from the con-

duct of the parties, and from the course of the transaction generally, we come to consider that which forms the whole question in the cause,—whether an appropriation of the fund deposited with the Bank of Scotland was effectually made by Mr. Yates? And first let us see how far the trust disposition of the 1st of April 1829 will carry us, without any regard to the will of April 1828. The island of Shuna seems to be the subject of that deed; the maker having probably discovered since April 1828, that the devise of real property situated in Scotland, which he had in the will of that date endeavoured to make, by executing it so as to pass lands in England, was wholly ineffectual for his purpose. He appears, however, to have deemed that will sufficient for executing his intention respecting his personalty as connected with the island, as indeed it was while unrevoked, and accordingly it is said that he rather refers to it as having declared those intentions, than repeats his declaration. I cannot, however, either consider the passage of the trust deed to which I am alluding as a mere reference to the will; nor can I think, even if it were, that this circumstance would destroy its force; if it were a mere reference, nothing is more certain than that by words of recital, you may validly bequeath or devise, and that saying you have done so, if you say it distinctly, is as valid a gift as if there was a reference or recital in the passage. But granting that the subsequent cancelling of the will to which reference is made, would have the effect of cancelling also this reference, the last words of the passage appear substantive and not relative to the will. “Now, if this transaction should not be closed before my death,” &c. (His Lordship read the whole clause as in p. 551, *ante*), “and till the entry stipulated to be made with the superior is

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implemented; or *if the latter is called for before the titles are purged, it may with no impropriety be taken from the sum in deposit.*" These words, "or if the latter," &c. do not in form relate to the will previously made, but contain a direction, or a declaration of an intention, nowhere to be found in the will, and they are therefore an addition to the declaration there contained.

But let us consider the last will, which was admitted to probate. It is dated the 17th April 1829, sixteen days after the date of the trust disposition; and it clearly refers to the English property only. He considered that in the trust deed he had disposed fully of his Scotch property; and the will is addressed to the English property. This circumstance and the express reference to the provision of the deed in the will, appear to me sufficient to render them both parts of one conveyance; for he says in the will, "It may be proper to observe, that by a will made in this present month and year I have disposed of the island of Shuna, in Argyllshire;" and he also mentions his "stock of cattle and other effects in Shuna" as part of the residue. Now supposing this last will to have the effect, which it undoubtedly has, generally speaking, of revoking the first will, it seems to me by no means so clear that it revokes whatever part of that first will is, by reference to it in the trust deed, republished and imported into that trust deed; for the sounder view of the matter seems to be, that the trust deed and the will of 1829 being taken as one, the will of 1829 only revokes so much of the will of 1828 as is not imported into or referred to by the deed. Indeed, if the trust disposition and last will be regarded as one conveyance, the last will no more revokes the part of the trust disposition referring to the generally revoked will of 1828, than if the reference had been

contained in the last will, that of 1829. This consideration goes far to satisfy me that the revocation operated by the last will, after the date of the trust disposition, renders the passage in the trust disposition, which refers to the will of 1828, substantive and not relative, and prevents the general revocation subsequently effected from having any force to destroy the import of that passage as a valid declaration of the testator's intention. It might even be argued that you would, upon this ground, have a right in our Courts, and, according to our strict practice, to look at the revoked will by means of the reference, first in the trust deed to that will, and next in the last will to the trust deed. But this needs not now be considered.

Although, therefore, I am of opinion that there is no necessity for admitting the first will in order to dispose of this case and to support the decree of the Court below, yet the importance of the question connected with its admission in evidence is sufficient to require that I should state in what light I view it. It is on all hands admitted that the whole distribution of Mr. Yates's personal estate must be governed by the law of England, where he had his domicile through life, and at the time of his decease, and at the dates of all the instruments executed by him. Had he died intestate, the English statute of distributions, and not the Scotch law of succession in moveables, would have regulated the whole course of the administration. His written declarations must, therefore, be taken with respect to the English law. I think it follows from hence, that those declarations of intention touching that property must be construed as we should construe them here by our principles of legal interpretation. Great embarrassment may, no doubt, arise from calling upon a Scotch Court to apply the

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principles of English law to such questions, many of those principles being among the most nice and difficult known in our jurisprudence. The Court of Session may, for example, be required to decide whether an executory devise is void as being too remote, and to apply, for the purpose of ascertaining that question, the criterion of the gift passing or not passing what would be an estate in realty, although in the language of the Scotch law there is no such expression as executory devise, and within the knowledge of Scotch lawyers no such thing as an executory estate tail. Nevertheless, this is a difficulty which must of necessity be grappled with, because in no other way can the English law be applied to personal property situated locally within the jurisdiction of the Scottish forum, and the rule which requires the law of the domicile to govern succession to such property could in no other way be applied and followed out. Nor am I aware that any distinction in this respect has ever been taken between testamentary succession, and succession *ab intestato*, or that it has been held either here or in Scotland that the Court's right to regard the foreign law was excluded wherever a foreign instrument had been executed. It is therefore my opinion that in this, as in other cases of the like description, the Scotch Court must inquire of the foreign law as a matter of fact, and examine such evidence as will show how in England such instruments would be dealt with as to construction. I give this as my opinion upon principle, for I am not aware of the question ever having received judicial determination in either country.

But here I think the importing of the foreign code (sometimes incorrectly called the *comitas*) must stop: what evidence the Courts of another country would receive, and what reject, is a question into which

I cannot at all see the necessity of the Courts of any one country entering. Those principles which regulate the admission of evidence are the rules by which the Courts of every country guide themselves in all their inquiries. The truth with respect to men's actions, which form the subject-matter of their inquiry, is to be ascertained according to a certain definite course of proceeding, and certain rules have established that in pursuing this investigation some things shall be heard from witnesses, others not listened to; some instruments shall be inspected by the judge, others kept from his eye. This must evidently be the same course, and governed by the same rules, whatever be the subject-matter of investigation; nor can it make any difference whether the facts, concerning which the discussion arises, happened at home or abroad; whether they related to a foreigner domiciled abroad, or a native living and dying at home. As well might it be contended that another mode of trial should be adopted as that another law of evidence should be admitted in such cases. Who would argue that in a question like the present the Court of Session should try the point of fact by a jury according to the English procedure, or should follow the course of our dispositions or interrogatories in courts of equity, because the testator was a domiciled Englishman, and because those methods of trial would be applied to his case were the question raised here? The answer is, that the question arises in the Court of Session, and must be dealt with by the rules which regulate inquiry there. Now the law of evidence is among the chief of these rules; nor let it be said that there is any inconsistency in applying the English rules of construction and the Scotch ones of evidence to the same matter, in in-

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vestigating facts by one law and intention by another. The difference is manifest between the two inquiries; for a person's meaning can only be gathered from assuming that he intended to use words in the sense affixed to them by the law of the country he belonged to at the time of framing his instrument. Accordingly, where the question is what a person intended by an instrument relating to the conveyance of real estate situated in a foreign country, and where the *lex loci rei sitæ* must govern, we decide upon his meaning by that law, and not by the law of the country where the deed was executed, because we consider him to have had that foreign law in his contemplation.

The will of April 1828 has not been admitted to probate here; it has not even been offered for proof, so that there is no sentence of any Court of competent jurisdiction upon it either way. But in England it would never be received in evidence nor seen by any Court; neither would it have been seen if it had been proved ever so formally. Our law holds the probate as the only evidence of a will of personalty, or of the appointment of executors; in short, of any disposition which a testator may make, unless it regards his real estate. Can it be said that the Scotch Court is bound by this rule of evidence, which, though founded upon views of convenience, and for anything I know well devised, is yet one which must be allowed to be exceedingly technical, and which would exclude from the view of the Court a subsequent will, clearly revoking the one admitted to probate. The English Courts would never look at this will, although proof might be tendered that it had come to the knowledge of the party on the eve of the trial. A delay might be granted to enable him to obtain a revocation of the

probate of the former will. It is absurd to contend, that the Court of Session shall admit all this technicality of procedure into its course of judicature as often as a question arises upon the succession of a person domiciled in England.

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Again, there are certain rules just as strict, and many of them not less technical, governing the admission of parol evidence with us. Can it be contended, that, as often as an English succession comes in question before the Scotch Court, witnesses are to be admitted or rejected upon the practice of the English Courts; nay, that examination and cross-examination are to proceed upon those rules of our practice, supposing them to be (as they may possibly be) quite different from the Scotch rules? This would be manifestly a source of such inconvenience as no Court ever could get over. Among other embarrassments equally inextricable there would be this: that a host of English lawyers must always be in attendance on the Scotch Courts, ready to give evidence, at a moment's notice, of what the English rules of practice are touching the reception or refusal of testimony, and the manner of obtaining it; for those questions which, by the supposition, are questions of mere fact in the Scotch Courts, must arise unexpectedly during each trial, and must be disposed of on the spot in order that the trial may proceed.

The case which I should however put, as quite decisive of this matter, comes nearer than any other to the one at bar, and it may, with equal advantage to the elucidation of the argument, be put as arising both in an English and in a Scotch Court. By our English rules of evidence no instrument proves itself, unless it be thirty years old, or is an office copy authorized by law to be given by the proper officer,

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or is the London Gazette, or is by some special Act made evidence, or is an original record of a Court under its seal, or an exemplification under seal, which is *quasi* a record. By the Scotch law all instruments prepared and witnessed according to the provisions of the Act of 1681 are probative writs, and may be given in evidence without any proof. Now suppose a will of personalty or any other instrument relating to personal property, attested by two witnesses and executed in England according to the provisions of the Scotch Act, is tendered in evidence before the Court of Session; it surely never will be contended that the learned Judges, on being satisfied that the question relates to English personal succession, ought straightway to examine what is the English law of evidence, and to require the attendance of one or other of the subscribing witnesses, where the instrument is admissible by the Scotch law as probative. Of this I can have no doubt. But suppose the question to arise in England, and that a deed is executed in Scotland according to the Act of 1681 by one domiciled here, would any Court here receive it as proving itself, being only a year old, without calling the attesting witnesses? It would have a strange effect to hear the circumstance of there being two subscribing witnesses to the instrument, which makes it prove itself in the Parliament House of Edinburgh, urged in Westminster Hall as the ground of its admission without any parol testimony. The Court would inevitably answer, "two witnesses—then, because there are witnesses, it cannot be admitted, but they must, one or other of them, be called to prove it." The very thing that makes the instrument prove itself in Scotland, makes it in England necessary to be proved by witnesses. I have, therefore, no doubt

whatever that the rules of evidence form no part of the foreign law, according to which you are to proceed in disposing of English questions arising in Scotch Courts.

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It by no means follows, that where a sentence of a foreign Court is offered in evidence in Court—the probate, for example, of an English will, it should not be admitted; nor do I think it should be denied its natural and legitimate force. But that it must, like all other instruments, be received upon such proof as is required by the rules of evidence, followed by the Court before which it is tendered, I hold to be quite clear; it will follow, that though a probate striking out part of a will would be received, and the Court of Session would have no right to notice the part struck out—for this would be reversing or at least disregarding the very sentence of the court of probate, yet the non-probate of a person's will would not prevent the Court from receiving and regarding that will if its own rules of evidence did not shut it out. So, too, it is unnecessary here to decide what would be the course in the Scotch Courts in the case of an English will of personalty attested by one witness, after an Act should have passed requiring two. I think, that though it might be admissible in evidence by the rules of evidence which would then govern, yet no effect could be given to its disposition, because of the rules of English law requiring two witnesses, that being a requisition not of form, in order to make the paper evidence, but of substance, in order to protect testators on their dying beds.

Upon these principles I am of opinion that the Court of Session had a right to receive and to look at the first will, with a view to examine the testator's intention regarding this fund *in medio*. Upon the

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effect of that first will it is unnecessary to dwell further. The trust disposition seems to me a sufficient declaration of intention to appropriate. But the will leaves that intention free from all doubt. No doubt, if that will was wholly revoked by the subsequent one of April 1829, there would be an end of such a declaration in Scotland as well as in this country. But I have stated why I think the trust deed, and even the connexion between that and the last will, cannot be regarded as revoking any intention respecting the fund and the island expressed in the earlier will, and why *quoad* that intention it cannot be held revoked. The whole course of the transaction and the whole circumstances of the parties confirm this view of the case. I therefore move your Lordships that the judgment of the Court below be affirmed, but without costs.

Ordered accordingly, "that the appeal be dismissed, and the interlocutors complained of affirmed, without costs."

## APPEAL

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24 March.

FROM THE COURT OF CHANCERY.

STEPHEN TURNER and MARY FOURNIER,  
 ... Executor and Executrix of J. L. FOUR- } *Appellants.*  
 NIER, deceased - - - - - }

WILLIAM HENRY DICKENSON, Assignee } *Respondent.*  
 of EMMA DICKENSON - - - - - }

*A.* became possessed of a tract of open waste ground called the Lydes. He built houses upon it, and gave the row of houses thus built the name of Somerset-place. There were gardens behind these houses, and a lawn in front, and roads and footpaths connecting them with the roads of the neighbourhood. *A.*, to carry on the building speculation in which he was engaged, borrowed money at different times from *B.*, and occasionally made up accounts of advances and payments, and struck balances, for which he gave different securities. In the year 1808, he gave as a security for the repayment of the money then due, an agreement, whereby he charged certain houses at that time unfinished, "and likewise all and every other the messuages or dwelling-houses, lands, hereditaments, and fee-farm ground rents, also situate and lying in Somerset-place aforesaid, adjoining the said unfinished messuages or dwelling-houses," with the payment of the sum then found due to *B.*; and he thereby agreed to execute to *B.* "a good and sufficient mortgage of all and every his said messuages or dwelling-houses, lands, hereditaments, and fee-farm or ground rents." In 1810, *A.* collected the water from springs on the Lydes into a reservoir, which he formed on the lawn, and he agreed with certain other persons to supply their houses with water on receiving a compensation "in the nature of a rent issuing out of their

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*Mortgage.*  
*Practice.*

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premises for ever after, and recoverable in the usual manner by distress and entry." In 1813 another settlement took place between him and *B.*, and *A.* entered into another agreement with *B.*, in the same terms as the former, for securing payment of the sum then found due to *B.* The title-deeds of the Lydes were then left by *A.* in the hands of *B.*'s solicitor. After all this had been done, a house called the Ivy House was built upon a strip of land at the south-western extremity of the space which had been called the Lydes, and outside the carriage-road which ran round the lawn to the houses. HELD, that the reservoir and the Ivy House were by force of the terms in *A.*'s agreement chargeable with the payment of the debt to *B.*

Where there is a statement of a fact in the case presented by the Appellant to this House as the subject of appeal, the Respondent, if he objects to such statement, should apply to have it struck out. If he omits to do so, such fact will  
 • be afterwards taken as uncontradicted.

UNDER two several conveyances made in the years 1784 and 1786, Thomas Paine was, previously to the month of November 1805, entitled to a piece of ground in the parish of Walcot, in the county of Somerset, on which he intended to build certain dwelling-houses. This ground was called the Lydes, or the Great Lydes. The houses were afterwards erected, and formed a crescent called Somerset-place. The spot called the Lydes was, when Paine first became the purchaser of it in 1784 and 1786, an open space of ground, inclosing in its area the ground on which the houses afterwards called Somerset-place were built, a lawn in front thereof, gardens and coach-road behind, and a house, called indifferently Protection House or Ivy House, at the extreme end of the lawn. From the year 1805 to 1813 inclusive, Emma Dickenson, at different intervals, advanced money to Paine for the purposes of the buildings he was then erecting, and

from time to time settlements of accounts were made between them, and balances were struck, and securities given. On the 2d November 1805, the sum of 200 *l.* being due to Emma Dickenson, Paine gave his bond, conditioned in the penal sum of 400 *l.*, to secure its repayment with five per cent. interest. On the 2d November 1807, another settlement of accounts took place, when 835 *l.* 8 *s.* 3 *d.* were found to be due, and Paine then executed an agreement to “charge or subject the two messuages or dwelling-houses lately erected and built, but not finished, and also the two messuages or dwelling-houses adjoining, now erecting and building, with their appurtenances, and respectively situate and lying in the parish of Walcot, in the county of Somerset, and near the city of Bath, with the payment of the said sum.”

The two messuages or dwelling-houses described as being lately erected but not finished, and the two messuages or dwelling-houses described as adjoining those erections and buildings, with their appurtenances, were afterwards known by the numbers 17, 18, 19 and 20, in Somerset-place. On the 24th of June 1808, another account was made out, and a balance of 2,225 *l.* 2 *s.* was found to be due to Emma Dickenson, and Paine further charged the premises with the payment of that sum, and lawful interest for the same. A further settlement of accounts took place on the 14th of September in that year, when Paine was found indebted in the sum of 2,425 *l.*, and signed a memorandum in writing, at the foot of the account, whereby he acknowledged the account to be correct, and charged the before-mentioned premises, “and likewise all and every other the messuages or dwelling-houses, lands, hereditaments and fee-farm ground-rents, also situate and lying in Somerset-place afore-

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said, adjoining the said before unfinished messuages or dwelling-houses, with the payment to the said Emma Dickenson, her heirs, executors, administrators and assigns, of the sum of 2,425 *l.* 0*s.* 0*d.*, and he thereby agreed to make and execute unto the said Emma Dickenson a good and sufficient mortgage of all and every his said messuages or dwelling-houses, lands, hereditaments and fee-farm or ground-rents."

Previously to September 1808, Paine had collected the water from the upper part of the Lydes, and brought the same into a reservoir at the lower end of the lawn, and laid out the lawn for an ornament to the buildings called Somerset-place.

On the 28th of June 1810, an agreement was entered into between Paine of the one part, and William Broom and James Chapman, builders, of the other part, whereby, after reciting that Paine was possessed of the piece of land called the Lydes, and that there were springs of water thereon, and that Broom and Chapman were possessed of a piece of land adjoining the land belonging to Paine, and that they intended to build houses thereon (they were afterwards built and called Cavendish-place), Paine agreed to supply such houses with water, and to erect for that purpose cisterns, and to connect the same with the reservoir by means of a main pipe. The consideration for this agreement was to be the payment of a rent in respect of each house, and it was stipulated that the sum or sums of money to be paid for the supply of water to each house should be considered in the nature of a rent issuing out of the same premises for ever thereafter, and recoverable in the usual manner by distress and entry on the same premises; and it was thereby agreed and declared, that if the said intended reservoir should, by or in consequence of the failure of the springs, or

in consequence of any other unavoidable means except the neglect or default of Broom and Chapman, cease to afford any water for the purposes thereinbefore mentioned, then all the annual rents should cease and be no longer payable. A similar agreement was made between the same parties for the supply of water to a pile of buildings called Cavendish-crescent.

On the 14th September 1813, a further account was settled between the parties, when Paine was found indebted in the sum of 7,768 *l.* 6 *s.* 4 *d.*, and an agreement of that date was duly executed, whereby Paine "charged the four messuages or dwelling-houses lately built by him, with their respective appurtenances, in a certain place or site of buildings called Somerset-place, in the said parish of Walcot, and likewise all and every other the messuages or dwelling-houses, lands, tenements and fee-farm or ground-rents, also situate and lying in Somerset-place, adjoining the aforesaid four newly erected messuages or dwelling-houses, with the payment to the said Emma Dickenson, her heirs, executors, administrators and assigns, of the said sum of 7,768 *l.* 6 *s.* 4 *d.*; and the said Thomas Paine thereby promised and agreed to execute to the said Emma Dickenson a good and sufficient mortgage of all and every his said messuages, dwelling-houses, lands, hereditaments and fee-farm or ground-rents situate and lying in Somerset-place, including therein the four newly erected messuages or dwelling-houses, subject to theseveral charges and mortgage incumbrances thereon, as soon as such mortgage could be prepared and tendered to him for execution." The title-deeds by which Paine held the Lydes, from and after the 10th of March 1813, remained in the possession of one John Slade, who was the solicitor of Mrs. Emma Dickenson. The house called the Protection or Ivy House, was afterwards

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built on part of the land called the Lydes. It was separated from the lawn in front of the houses in Somerset-place, by a dwarf wall and by the coach-road going up to the houses, but it had the appearance of a sort of entrance lodge to the larger buildings.

By an indenture of the 31st of August 1815, between Paine of the one part, and John Lewis Fournier, since deceased, of the other part; after reciting that Fournier had at several times lent to Paine certain sums of money, making in the whole 700 *l.*, and had engaged to lend him the further sum of 300 *l.*, but that all the interest in respect of the 700 *l.* had been paid or secured up to the day of the date of the indenture now in recital; and also reciting, that Fournier had not as yet received any securities whatever for the monies so advanced, and therefore had applied to Paine for that purpose, who had proposed to give him his bond for the 700 *l.*, and to enter into the covenant thereafter mentioned for granting and executing to Fournier a mortgage in fee or for a term of years of a messuage or tenement which Paine was then building upon a certain plot of ground situate and being near Somerset House, in the parish of Walcot, with the rights, members and appurtenances, and to assign to Fournier, by way of mortgage or by way of further or collateral security, the beneficial interest of him, Paine, in the agreements of the 28th and 29th days of June 1810, which it was agreed should, with the indenture now in recital, in the meantime be deposited in the hands of Fournier; and also reciting that Paine, in part performance, had by his bond bearing even date with the indenture now in recital, become bound unto Fournier, his executors, &c. in the penal sum of 1,400 *l.*, with a condition thereunderwritten for making the same void on payment by Paine, his heirs, &c. to

Fournier, his executors, &c. of the sum of 700*L.*, with lawful interest for the same, on the 1st day of March then next ensuing: it was witnessed that in performance of the proposal, and in consideration of the 700*L.* so advanced, and of 300*L.* intended to be advanced to Paine by Fournier, Paine did thereby for himself, his heirs, &c. covenant and agree with Fournier, his heirs, &c., that Paine, his heirs, &c. should, on the 1st of March 1816, execute a good mortgage, for the purpose of securing the said sum of 700*L.*, with lawful interest for the same, to be calculated from the day of the date of the indenture now in recital, together with the 300*L.* intended to be advanced, with lawful interest thereon, with all the other monies which, at the time of the execution of such mortgage, should have been advanced by Fournier to Paine, together with lawful interest upon such last-mentioned monies; and that Paine did thereby further covenant that Paine, his heirs, &c. would, by such mortgage, convey, release, assign, or otherwise assure to Fournier, his heirs, &c., all that plot, piece, or parcel of ground situate, lying, and being near or opposite Somerset House, in the occupation of Paine, and the messuage or tenement then building and intended to be built thereon (afterwards built and called Protection or Ivy House), with their and every of their rights, members, and appurtenances, and also the water rents reserved in and by the agreements or contracts thereinbefore severally referred to, together with the said contracts, and all deeds, muniments of title, and papers, relating to the said premises respectively. The agreements of the 28th and 29th of June 1810 were, before the 31st of August 1815, deposited by Paine in the hands of Fournier.

Fournier, in Trinity Term 1820, filed his bill in

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the Court of Chancery against Paine and Emma Dickenson, stating the indenture of the 31st of August 1815, and that after the execution thereof Fournier advanced to Paine the sum of 330 *l.* 6 *s.* 11 *d.*, making the total sum due to Fournier 1,033 *l.* 6 *s.* 11 *d.* principal money, with interest thereon, and praying amongst other things that an account might be taken of what was due to Fournier for principal and interest, upon the security of the premises, and that Paine might be decreed to pay to Fournier what should appear to be due upon such account, together with his costs, or in default thereof that Paine, and all persons claiming under him, might be compelled to convey and assign to Fournier the house situate near Somerset House, and the water rents, and all his and their right and interest therein respectively, and to deliver to Fournier all deeds and writings relating to the premises, and every part thereof, not already in Fournier's possession, or that the said mortgaged premises might be sold under the direction of the Court, and that the money arising thereby might be applied towards satisfaction of what should be found due to Fournier as aforesaid.

Answers having been put in, by an order made by the Vice-Chancellor in the cause, bearing date the 4th of August 1821, it was ordered that it should be referred to Mr. Dowdeswell, one of the Masters, to appoint a proper person to be receiver of the rent of the house and premises called Protection or Ivy House, and also of the water rents in the pleadings mentioned, with the usual directions: And it was ordered, that the Master should inquire and state to the Court the extent and priority of the securities held by Fournier and Emma Dickenson, and in order thereto the parties were to produce before him, upon oath, all

deeds, papers, and writings relating thereto, and were to be examined upon interrogatories as the Master should direct.

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On the death of J. L. Fournier the Appellants became entitled as executor and executrix of his will, and Emma Dickenson assigned her interest in the premises to the Respondent. The suit was continued in the names of these new parties.

The Master made his report, dated the 20th of July 1824, and, after stating the several facts, he certified that the securities of Emma Dickenson, under and by virtue of the several agreements of the 2d November 1805, the 2d November 1807, the 24th June 1808, and 14th September 1813, and by the deposit of the title-deeds of the lands and premises formerly called Lydes or Great Lydes, extended over the whole of the premises, and comprised the lawn on which the reservoir was formed, and whence the houses in Cavendish-place and Cavendish-crescent were supplied with water, and also the house called the House of Protection or Ivy House; and he certified that, by virtue of the indenture of the 31st of August 1815, and by the deposit of the several indentures of the 28th and 29th of June 1810, the security of Fournier extended over the water rents reserved by the several indentures of the 28th and 29th of June 1810; and also the plot, piece, or parcel of ground, described in the indenture of the 31st of August 1815, situate near or opposite Somerset House, in the occupation of Paine, and the messuage or tenement then intended to be built thereon, and which had since been built, and had been called the House of Protection or Ivy House, but subject as to such piece or parcel of ground, and messuage or tenement, to the prior security which

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Emma Dickenson acquired by the means thereinbefore mentioned.

The Appellants took two exceptions to the report; first, that the Master ought not to have found that the securities of Emma Dickenson extended over the whole of the premises in the report in that behalf mentioned, and comprised the lawn on which the reservoir therein mentioned is formed, and whence the houses in Cavendish-place and Cavendish-crescent are supplied with water, and also the house called the House of Protection or Ivy House; secondly, that the said Master ought not to have found that the security of Fournier, upon the House of Protection or Ivy House, was subject to the prior security which Emma Dickenson acquired by the means thereinbefore mentioned. On the 11th of March 1826 the Vice-Chancellor allowed the exceptions. The Respondent then appealed to Lord Lyndhurst, then Lord Chancellor; which appeal was heard on the 19th of November 1828, when his Lordship overruled the exceptions.

The cause came on to be heard before his Lordship on the 19th of May 1829, when the Appellants declining to redeem the Respondent on the footing of the Master's report, as confirmed by the order made on appeal, it was ordered that the suit should be dismissed with costs, to be paid by the plaintiffs.

The Appellants presented their petition of appeal from this order of dismissal, which last-mentioned appeal came on to be heard before Lord Chancellor Brougham on the 10th of August 1832, when the Appellants asserted that they were willing to redeem the Respondent on the footing of the Master's report, so confirmed as aforesaid; and thereupon, by the decree of his Lordship, the decree of the 19th of May

1829, dismissing the suit, was reversed, and it was ordered that it should be referred to the Master, to whom the cause was referred, to take an account of what was due to the Respondent as representative of Emma Dickenson, for principal and interest on the security which Emma Dickenson acquired, as in the report mentioned, and to tax the costs of the Respondent; and upon the Appellants paying to the Respondent what should be reported due for such principal, interest, and costs, within six months after the Master should have made his report, it was ordered that the Respondent should re-assign the premises comprised in his securities, &c. to the Appellants; but in default of the Appellants paying to the Respondent what should be reported due as aforesaid, the Appellants' bill was to stand dismissed out of Court, with costs to be taxed by the Master; but in case the Appellants should redeem the Respondent, it was ordered that the Master should take an account of what was due to them for principal and interest on their mortgage, and tax their costs of suit, and compute interest on what they should have so paid to the Respondent, and upon his paying to them what should be reported due to them for principal, interest, and costs, together with what they should have paid to him, with interest thereon as aforesaid, within three months after the Master should have made his report, it was ordered that they should reconvey the mortgaged premises, free and clear from all incumbrances, &c.; but in default of the Respondent paying to the Appellants what should be reported due to them as aforesaid, he was thenceforth to stand absolutely foreclosed as to the mortgaged premises.

The Appellants appealed from the order of the 19th of November 1828, and from the decree of the 10th

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of August 1832, except so far as the latter reversed the decree of the 19th of May 1829.

Mr. *Knight* and Mr. *Lynch* for the Appellants:—It is impossible to say, that the words of the agreements made with Mrs. Dickenson convey to her a mortgage of the whole of the premises. The four houses, especially mentioned by their numbers in the first agreement, are situated at one end of the property. It is a forced construction to say, that the mortgage includes all the Somerset-place property. The reservoir and the Ivy House are clearly not included in the grant. [Lord *Lyndhurst*, Lord Chancellor.—What is it constitutes a square? Is it a row of houses.] *Primâ facie* it is. [Lord *Lyndhurst*.—On the contrary, does not the word square *primâ facie* include the whole area surrounded by the houses, as well as the houses themselves? Lord *Brougham*.—Suppose there was a lease with these words, “All my freehold premises called Grosvenor-square,” might it mean the houses, or the enclosed square, or the houses *plus* the square?] That is hardly the case here, which more nearly resembles a lease conveying the houses numbered 1, 2, 3 and 4, in Grosvenor-square, and the land and ground rents adjoining. It would be difficult to say, that a piece of pleasure ground divided by a pavement and a carriage-road from the houses, would pass under such a conveyance. Paine here continued entitled to the exclusive possession of the Ivy House and reservoir, which would make a difference between this case and the supposed case of Grosvenor-square, for the right of walking in the pleasure ground there is reserved to the inhabitants, who might cut down any obstruction to the enjoyment of that right. There was evidence taken in this case before the Master, which

is important as ascertaining the probable meaning of the parties. The Bath chairmen stated, that if hired to go to Somerset-place they should not stop at the Ivy House, but go on to the row of buildings properly so called. The evidence is all in favour of the Appellants, so are the probabilities of the case; for it is not likely that if Paine had deemed the whole of the land to be already mortgaged, he would have laid out any additional sum of money in erecting the reservoir and the Ivy House upon it. Then, as to the rule of construction. In construing conveyances, bonds, and other instruments, the Courts correct certain words, however general, when the context of the whole document requires such correction. The context here does require such correction of particular expressions, and the evidence shows the nature and extent of the required correction. The fact of the alleged deposit of the deeds with Emma Dickenson in 1813, is denied by the Appellants. It is wholly inconsistent with the language of the trust. The Appellants therefore say, that no equitable mortgage was created in her. [Lord Brougham.—That deposit is stated as a fact in the case, presented to us by the Appellant as the subject of appeal. If you objected to the statement, you should have applied to have it struck out of the Appellants' case. That is always the course in this House; else we might be proceeding on matters which were not in evidence.] But even supposing Mrs. Dickenson to be an equitable mortgagee by deposit of deeds, her title, contradicted as it is by a written instrument, will not be favoured by the Court. That doctrine was distinctly laid down in *Ex parte Coombes* (a), and has been acted upon ever since. There was no adverse possession here, for Slade, in

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(a) 17 Ves. 369; 1 Rose, 261.

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whose possession the deeds were left, was the solicitor not only of Mrs. Dickenson but of Mr. Payne. There is no evidence beyond the fact that the deeds were in his hands, certainly none that he held them as solicitor for Mrs. Dickenson and adversely to Mr. Payne. On the other hand, the deposit of the contracts and the indenture made between Payne and him in August 1815, gave him a prior security over the reservoir and the Ivy House, those portions of Payne's property, under the description of the ground and building lying near to and opposite Somerset House and the water rents, being distinctly mentioned therein.

Mr. *Pemberton* and Mr. *Simkinson* for the Respondent:—There was clearly an equitable mortgage effected by the deposit of these deeds, and it is too late for the Appellants now to dispute that question. Then do the agreements under which that mortgage was made include the Ivy House and the reservoir? They do; for the terms used give as specific a description of the property as was then capable of being applied to it. The doctrine in the case cited may be admitted, but the equitable mortgage here is distinguishable from the one made in that case, for here it was made in conformity to and under the provisions of a written agreement. The terms employed in the agreement are such as to cover property of every description “situate and lying in Somerset-place,” and the words “Somerset-place” include the whole of that property which had formerly been known by the name of the Lydes. Those words cannot be restricted to the row of houses, but must be taken to refer to the lawn, garden-ground, reservoir, and Ivy House, all of which formed part of the land taken by Payne, and constituted a portion of the new district called Somerset-

place. To give a different construction would be to suppose that Mrs. Dickenson had continued to make advances on property which she must have known to be insufficient to secure her repayment. The four dwelling-houses would not have offered sufficient security, and therefore all the property designated by one general name was charged with the payment.

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Lord *Brougham*.—My Lords, I have no doubt that the construction put by the Master upon these instruments when he made his report was right. The question we have to decide is, whether the words used in them are large enough to convey the Ivy House and the reservoir. The burden of proving that they are not large enough for this purpose lies on the person who would exclude those places from their operation. Is there any intention to except them apparent on the face of these instruments? I think that there is none. The terms used are as large as they well can be. [His Lordship read them.] Somerset-place in these instruments seems to me to include the whole of the area formerly called the Lydes. Let us try the question by a familiar instance. Somerset House in London supplies one. The expression Somerset House, used with reference to the place known by that name in London, is used to designate the great square or pile of building in the Strand; but it most certainly also includes the open space there in the centre of which the statue is situated. If any of your Lordships should be asked where the Treasurer of the Navy lived, you would probably answer, “in Somerset House;” you would in that answer intend to include the whole site of the buildings. Yet it would be said, according to this argument, that the meaning of the answer must be confined to the house alone,

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for that otherwise it would not be properly described. Now it seems to me that the mortgagor here used the words in both senses, "all and every other my houses, lands, hereditaments, and fee-farm or ground-rents adjoining to the said unfinished messuages." The question then is, does the land in question lie in Somerset-place, and is it adjoining to those messuages? On referring to the description and comparing it with the plan, it does appear to lie in Somerset-place, and it does adjoin the unfinished premises. But then it is said that it is unlikely that a house of the description of the Ivy House, and at this distance from the rest of the buildings, and forming part of property of this peculiar kind, should pass under these general words without a particular specific description. The answer is, that in 1808 all these buildings and the reservoir did not exist, and no one who had then the property could dream of such a thing as the reservoir or the Ivy House being built. The building of that house was not then even in contemplation, and that was the sufficient reason why it and the reservoir were not specifically mentioned. But unless the mortgagor had excepted any buildings he might afterwards erect, these words would be sufficient to carry the house and the reservoir whenever they might be erected. It is said that he would not be likely to lay out any money if he thought there was a mortgage already existing on what he was about to build. But that is not so, for, having the equity of redemption, he would be benefited by the amount of the increased value of the property, and would be the more able to pay off the mortgage. If the road had been a frequented road, and a measured boundary had at that time existed so as to cut off the narrow slip of ground on which the Ivy House is built,

that house and the reservoir might have been excluded ; but all we know is, that there was then an open space of waste ground, and that there was nothing to form a natural boundary separating any one part of that space from any other part of it. Why then was he to exempt the strip of ground from the operation of the deed ? If the road now in existence had been then made, and the wall at present separating the Ivy House from the road had been then built, I should say that that might be sufficient to found the argument now employed ; but at the time that this agreement was made, nothing whatever existed as a natural boundary, and there was nothing to distinguish the watercourse or the strip of ground on which the Ivy House has since been built from the rest. I really have no doubt whatever that the language used in the agreements was meant to charge the whole of the property in the Somerset-place, and that the burden of proof is on the other side, to show the exemption of these portions of it from that charge. There is no exception, nor any intention of exception manifested, and I therefore think that the Master came to a right conclusion, and that the judgment of the Court below should be affirmed. But under all the circumstances of the case, as I think that there is some hardship in it, I should recommend your Lordships to affirm it without costs.

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Lord *Lyndhurst* (Lord Chancellor) concurred.

Judgment affirmed accordingly.

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June 24. 29,  
and July 6.

## APPEAL

FROM THE COURT OF SESSION.

JOHN SWAN, JOHN CARRUTHERS, JOHN }  
POOL, and JAMES MARTIN - - - } *Appellants.*

ALEXANDER BLAIR, Treasurer of the }  
Governor and Company of the Bank } *Respondent.*  
of Scotland - - - - - }

*Sureties.*  
*Stamp Acts.*  
*Settled*  
*Accounts.*

W. M. and others bound themselves by bond, jointly and severally, to pay to the Bank of Scotland such sums as should be drawn out by W. M., or be due from him, on a cash credit opened by the bank, in his name; and the certificate of the bank accountant was to be held sufficient to ascertain the balance due, and to warrant execution of law for such balance (not exceeding 5,000 *l.*) against the obligors. W. M. drew on the bank by orders, written on unstamped paper, payable to bearer; and though these drafts purported to be issued in the town where the bank was situated, they were in fact drawn and issued at a place more than ten miles distant, and were also post-dated, and the bank agent knew that they were wrong dated in point of place and time. W. M., having become insolvent, was found to owe to the bank on the cash credit account upwards of 4,000 *l.*, as certified by the bank accountant, and for that debt the bank put the bond in suit against his co-obligors.

Held by the Lords (reversing the decree of the Court of Session), that no obligation arose on the bond to pay any balance alleged to be due on drafts so drawn and issued, contrary to the provisions of the Stamp Act, 55 Geo. 3, c. 184, s. 13, which, in addition to penalties on the parties offending, declares, moreover, that a banker shall not be allowed any money paid on such drafts in account against the drawer or his representatives.

THE Appellants were co-obligors with one William Martin in a bond, for securing to the Bank of Scotland

repayment of monies advanced to W. Martin by the bank, or its agents. W. Martin became insolvent in 1831, and the Respondent on behalf of the bank took proceedings on the bond, and gave against the Appellants a charge for payment of upwards of 4,300 *l.*, alleged to be due to the bank in respect of the said advances of money, together with a penalty of 2,000 *l.* mentioned in the bond. The Appellants presented to the Court of Session a bill of suspension of the charge, and the appeal is against interlocutors pronounced in that action. (The case is reported 13 Shaw, Dunlop, & Bell, 403.) The facts, as collected from the pleadings, were these:—Mr. William Martin, writer in Lockerbie, which is upwards of ten miles distant from Dumfries, besides practising as a writer, carried on from the year 1819 to 1831 a considerable business as a discounteer of bills, but not having sufficient capital of his own to maintain this trade, he obtained accommodation from the Bank of Scotland at their office in Dumfries, by giving them bonds of caution for cash credit. The first of these bonds was granted in the year 1819 for 600 *l.*, and the Appellant Swan was one of the obligors. W. Martin afterwards requiring a further credit, a new bond was granted in September 1825, in which all the Appellants and other persons, since deceased, became co-obligors with W. Martin. This bond was in the common form of cash-credit bonds, and, as far as it is material to set it forth, was in the following terms: “We [obligors’ names and descriptions] in consideration of a credit of 10,000 *l.* sterling, given by the directors of the Bank of Scotland to us, on cash-account, in name of me, W. Martin, with the said bank, at the office thereof in Dumfries, &c., do hereby bind and oblige ourselves, conjunctly and severally, &c., to pay to the said bank, and to

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their treasurer for their behoof, &c., all such sums, not exceeding 10,000 *l.* sterling, as shall be drawn out from the said bank by me, W. Martin, or as may be contained, due, paid, payable or claimable on any drafts, orders, bills, promissory notes, receipts, guarantees, letters, obligations and documents whatever, drawn, accepted, granted, indorsed, or any how signed by me the said William Martin, or on my procuration, or liable on me by any legal construction, and whether discounted or paid to me the said William Martin, or to any other party, or retired by the said bank, or otherwise taken or holden by or for the said governor and company, all thereby *ipso facto* to be due hereon, and chargeable to the said cash account, and of all such sums hereon, to make payment aforesaid, whenever required, with legal interest, &c., together also with 2,000 *l.* sterling of liquidate penalty in case of failzie, &c.; and any account or certificate signed by the principal accountant of the said governor and company, or by their agent and accountant for the office where the said cash account may be kept, shall be sufficient to ascertain, specify, and constitute the sums or balances such as aforesaid, to be due hereon in principal, and thereon legal interest aforesaid, and shall warrant hereon all executorials of law against us conjunctly and severally, for such sums or balances in principal, and thereon legal interest aforesaid, and for the said liquidate penalty: Providing hereby that the said governor and company, and their aforesaid, shall not hereby nor by any execution or process whatever to follow hereon, have more from us (the co-obligors) than 5,000 *l.* sterling, and thereon legal interest, from the date of demand, &c., but these presents, without limitation, shall be available and effectual against me the said W. Martin."

This bond contained no reference to the bond given in 1819, which latter however continued to be in force and to be operated upon, but the accounts were kept distinct. The bonds and cash credits were arranged, on behalf of the bank, by Mr. Barker, their agent in the branch at Dumfries, who, as the Appellants alleged, was well acquainted with the way in which Martin transacted his discounting business, which was this: The bank furnished Martin with unstamped printed checks or orders, all bearing "Dumfries" as the place of issue, and having blank spaces for the sums and dates; Martin filled up, and issued at Lockerbie, these blank drafts in the course of his business, and so continued his operations on the bank account from the date of the bond in 1825 until his bankruptcy in 1831. He did not carry on business in Dumfries. In the bond he was designated "Writer in Lockerbie;" and the annual accounts furnished by the bank during the currency of the bond were titled, "State of cash account in name of William Martin, writer, Lockerbie, with the Bank of Scotland, in books thereof at Dumfries." The checks or orders were used by him in discounting at Lockerbie, for his own profit, bills, which were made payable at the Bank of Scotland's office in Dumfries, charging, besides a commission, a higher rate of discount than was charged to him by the bank. The bills so discounted were generally transmitted from Lockerbie, in letters and parcels addressed to Mr. Barker (a), the bank agent at

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(a) Specimens of letters and drafts:

" John Barker, Esq. Lockerbie, 29 July 1826.  
 I enclose in mixed notes the sum of - - £. 721 - -  
 Draft by Mr. William Mitchell - - - 10 - -

Amount of bills, see Bill Book - - - 731 - -  
 - - - 1,041 10 6  
 £. 1,772 10 6

" I also

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Dumfries, who discounted such of them as he considered good, and accounted to Martin for their proceeds, returning to him such bills as he refused to discount. Martin frequently discounted other bills, which did not pass into Barker's hands, and having, besides the discounting of bills, a variety of miscellaneous transactions in the line of his business, he used the bank drafts for these general purposes, sometimes sending them by a messenger from Lockerbie to Dumfries, and getting back the cash from Barker; and he often gave such drafts to third parties for value, who afterwards drew the amount from the bank at Dumfries. Although all these drafts bore the printed word, "Dumfries," purporting to be issued there, they were in fact issued at Lockerbie, and many of them were dated one or more days subsequent to the day on which they were actually issued or delivered by Martin. This post-dating of the drafts was alleged by the Appellants to arise from the circumstance of their not being expected to be presented to the bank until some time after they had been delivered at Lockerbie, on account of the distance. Most of the drafts were made simply payable to the "bearer," but some of them, given to third parties for value, were made payable to particular individuals, named in the drafts.

The accounts of these transactions between Martin and the bank agent at Dumfries were settled and

" I also enclose a draft on my account for 1,000*l.* sterling, cash for which you will send me by the bearer. I remain, &c.

" Copy.—Draft enclosed.

Dumfries, 31 July 1826.

" To the agent of the Bank of Scotland, Dumfries. Pay the bearer 1,000 *l.* sterling, and charge to account of,

" £. 1,000 sterling. (signed) *Wm. Martin.*"

doquetted annually, and the vouchers delivered up; as thus, "Dumfries, 6th April 1830. This account settled, vouchers exchanged, and the balance of 2,687 *l.* 4 *s.* 4 *d.* brought to the debit of new account at 1st ultimo. Signed William Martin." So also the account ending the 28th February 1831 was settled on the 13th of April following, and the vouchers mutually exchanged, leaving then a balance of 3,266 *l.* 14 *s.* 4 *d.* to the debit of the account.

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Martin became bankrupt in July 1831, and Mr. Barker was appointed trustee on his sequestrated estate. The whole balance due by him to the bank, as ascertained by the certificate of their agent and accountant for the branch at Dumfries, dated August 1832, was 4,709 *l.* 18 *s.* 3 *d.*, including 590 *l.* 17 *s.* alleged to be due on foot of the account opened in 1819; and for the whole sum the bank was admitted to rank on the sequestrated estate. For this sum and for the penalty in the bond, the Respondent on behalf of the bank issued a charge, as before mentioned, against the Appellants. They resisted the claim, alleging in their reasons for the bill of suspension, *first*, that they were not, as obligors in the bond of 1825, in any way liable for the balance alleged to be due on the separate bond of 1819, and that the Appellant Swan, who alone was obligor in that bond, was released by the delay and negligence of the bank in respect to that account; *secondly*, that they were not concluded from disputing the claim by reason of the settlement of accounts with Martin, or ranking of the debt on his sequestrated estate, as these transactions took place without notice to them; *thirdly*, and chiefly, that the whole transactions out of which the claim arose, were in violation of the 13th section of the Stamp Act, 55 Geo. 3, c. 184. "And for the more effectually preventing of frauds and evasions of the duties hereby granted on the bills of exchange, drafts,

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or orders for the payment of money, under colour of the exemption in favour of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed (*b*), be it further enacted, that if any person or persons shall, after the 31st day of August 1815, make and issue, or cause to be made and issued, any bill, draft, or order for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange, according to this Act,—the person or persons so offending shall, for every such bill, draft, or order, forfeit the sum of 100 *l*. And if any person or persons shall knowingly receive or take any such bill, draft, or order, in payment of, or as a security for the sum therein mentioned, he, she, or they shall, for every such bill, draft, or order, forfeit the sum of 20 *l*. And if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft, or order shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or know-

(*b*) The exemption referred to is in the first part of the schedule to the Act under the head “Bills,” and is as follows: “All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.”

ing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not, in any other respect, fall within the said exemption, then the banker or bankers, or person or persons so offending, shall, for every such bill, draft, or order, forfeit the sum of 100 *l.*; and, moreover, shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or for whom such bill, draft, or order shall be drawn, or his, her, or their executors or administrators, or his, or her, or their assignees or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under him, her, or them."

The bank, in their answer to the bill of suspension, submitted that as they were admitted to rank on the sequestrated estate for the whole debt charged for, the suspenders must be held to have acknowledged that debt, and to be barred by acquiescence from insisting in the suspension; that the balance of 590 *l.* 8 *s.* being ascertained by a regular voucher, they did not lose their right thereto by delay or negligence; that the whole balance charged for being legally constituted, not only by accounts certified by the bank's agent and accountant, according to the provision in the bond, but also by accounts finally settled and docketted by the parties, the allegations of the suspenders respecting the draft, being in violation of the stamp laws, were irrelevant; that the operations of Martin with the bank were conducted lawfully on the part of the bank; that they did not know that Martin post-dated or issued at Lockerbie any of the checks; that the drafts and other vouchers having been mutually given up at each annual settlement of the accounts, it must be presumed that a great many of them were lost or destroyed, and the allegations of the suspenders were

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thus quite incapable of being proved. But even supposing it necessary for the bank to found upon drafts or other vouchers which had been given up as useless, and might have been legally destroyed, there would be no room for holding that the drafts were issued in violation of the Stamp Act, or that the money paid upon them could not be recovered; for that as Lockerbie was admitted to be only 13 miles from Dumfries, Martin's drafts, even if issued at Lockerbie, were within the protection of the Act 9 Geo. 4, c. 49, s. 15, enacting "That from and after the passing of this Act, all drafts or orders for payment of any sum of money to the bearer on demand, and drawn in any part of Great Britain upon any banker or bankers who shall reside or transact the business of a banker within 15 miles of the place where such drafts or orders shall be issued, shall be, and the same are hereby exempted from any stamp-duty imposed by an Act or Acts in force immediately before the passing of this Act, any thing in such Act or Acts to the contrary notwithstanding, provided the place where such drafts or orders shall be issued shall be specified therein, and provided the same shall bear a date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes."

The case having been reported by the Lord Ordinary to the Lords of the Second Division of the Court of Session, their Lordships of that division, after hearing the case twice argued, pronounced this interlocutor: "5th February 1835.—The Lords &c., in respect that the present charge proceeds only on the bond of credit dated in 1825, sustain the reasons of suspension as to that portion of the debt charged for, which had been contracted under the previous bond of credit dated in

1819; suspend the letters *simpliciter* to that extent, and decern, without prejudice to any competent action to be brought by the chargers for recovery of the balance due under that previous bond, as effeirs; *quoad ultra*, as to the debt contracted under the second bond above alluded to, and in respect of the accounts docketed and balances certified by the proper parties, repel the reasons of suspension, and find the letters orderly proceeded, and decern: find the charger entitled to the expenses of process, but subject to modification; allow the account to be given in, and when lodged, remit to the auditor to tax and report."

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The Respondent lodged an account of expenses, and after it had been taxed, the Lords of the Second Division pronounced the following interlocutor: "27th February 1835.—The Lords having advised this amount, with the report of the auditor, approve thereof, and modify the account to the sum of 117*l.* 14*s.* 8*d.*, and decern for payment of that sum to the chargers, with dues of extract."

The appeal was against these interlocutors.

Sir *William Follett* and Mr. *Stuart* for the Appellants:—

The Court of Session sustained the Appellants' first reason of suspension under which they objected to the bank's charge, so far as it embraced a balance claimed under the bond of 1819; but repelled the objections to the whole charge on the ground of its being void under the Stamp Acts. This latter part of the interlocutor is founded on a misconstruction of the bond, in virtue of which the charge is given. One leading argument for the Respondent, to which the Court of Session inclined, was, that the Appellants were not to be viewed in this discussion as sureties for



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Martin, they being co-obligants, and bound “conjunctly and severally” with him for the whole debt. That was an erroneous construction of the bond, with reference both to its terms and to the judicial views taken of similar instruments by the Courts. The bond is an ordinary bond of caution for a cash account, so framed as to make all parties thereto co-obligants to the bank, and giving the bank a joint and several claim against the sureties, without first resorting to the principal, but not otherwise affecting their general rights. Even if the purport of the bond had not been fully revealed upon the face of it, still it would have been competent for the Appellants to explain the real nature of the obligation by extraneous proofs, *Smollett v. Bell* (c), *Hume v. Youngson* (d); and so in a late case in this House, it was held that a person bound as full debtor for another in a bond for a cash account was a surety, and entitled to all the equities as such: *Mackenzie v. Macartney*, 23d September 1831 (e). In the bond there is no authority, either express or implied, empowering Martin to waive or renounce any legal defence which might be competent to the Appellants as cautioners in the obligation; yet the Court below has, by implication, found such a stipulation in the bond, and decided the case upon that view, assuming a general authority in Martin to act for the cautioners in regard to the claim of the Bank. According to the view on which the case was decided, Martin, by settling and docketting the accounts and recognising the claim, discharged not only the objection of illegality founded on the Stamp Acts, but all other objections which might previously have been competent against the claim.

(c) *Morr.* 12354.

(d) 8 *Shaw & Dunlop*, 295.

(e) Now reported, 5 *Wils. & S.* 504.

The judgment of the Court below is also founded on a misconstruction of the Stamp Acts. Some of the Judges of the Court of Session seemed to be of opinion that these Acts were to be construed strictly, and that their provisions ought not to be extended to cases not falling directly within their enactments. The Appellants do not dispute this rule of construction, to a certain extent; they even admit that Acts of Parliament imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the legislature. But this rule is not applicable to the present case, in which the question is not whether the drafts did or did not require stamps, it being undeniable that they did; but the Stamp Acts must be construed so as to give full effect to their provisions, and any interpretation leading to an evasion of them ought to be rejected. Here their provisions have been directly violated, by a tacit arrangement between a third party and the bank, both contraveners of the statutes. The bank had for years been enabled, with impunity, to conduct the banking business of a large district, extending far beyond the distance referred to in the exception in the schedule to the Stamp Act, and had transactions to the extent of some hundred thousand pounds, in manifest evasion of the Act. The provisions of an enactment intended for a public purpose cannot be waived by any private arrangement, even in a question between the parties to that arrangement: *pactis privatorum publico juri derogari nequit*. The case as determined by the Court of Session exhibits this anomalous result, that the bank and Martin have, by a private arrangement in violation of the Stamp Act, not only wiped away the effects of their own illegal acts, but have rendered those acts binding on third parties, and

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excluded them from maintaining the objection on the statute. The reason which seemed chiefly to prevail with the Court below was, that the claim of the bank was not made upon the illegal drafts but upon the docketted accounts, which were said to be sufficient evidence to support the claim, and which required no stamp.

The docketting of the accounts, being the private acts of Martin and of the bank, is not obligatory upon the Appellants. As furnishing a claim against Martin, the docketted accounts may or may not be sufficient; but the Appellants are in a very different situation, and they repudiate the docket, as being *res inter alios acta*. This view of the case casts the Respondents back upon the original account, which they cannot prove except by the original drafts, which are subject to the Appellants' objection. The settled accounts, which are alleged to constitute an acknowledgment of the debt, do not remove the illegality in the original contraction of the debt. The acknowledgment of a debt merely prevents the operation of the Statutes of Limitation; the original evidence of the obligation remains unaffected; any defect in it cannot be cured by the bare acknowledgment of a debt; an acknowledgment will not make that good which was bad originally: *Castleman v. Ray* (e).

As the settled accounts specially refer to the drafts, that reference subjects the drafts to inquiry, and then arises the objection on the Stamp Acts. Where the written instrument cannot be read in evidence, it frequently happens that other evidence may be resorted to; but that evidence must have no reference to the rejected instrument, or at least must be sufficient

(e) 2 Bos. & P. 383.

without calling it in aid. The reference made in the docketted accounts to the drafts, renders it competent to the Appellants to demand an inquiry as to the nature of the drafts, which confessedly form the elements of the bank's claim; even if the docketted accounts were to be regarded as *prima facie* proofs of a legal debt, still it would be competent for the Appellants to disprove the debt by showing that the original consideration was illegal.

With respect to the Respondents' plea of the protection of the Act 9 Geo. 4, c. 49, s. 15, the effect of that was merely to extend the distance for the operation of the exemption from 10 to 15 miles. That provision does not repeal or affect in any way the express enactments in the prior Stamp Act as to the necessity of the draft bearing the true place of drawing—being dated on the day on which it was issued, and being alone made payable to the bearer on demand. It is the want of these requisites, and the violation of these standing provisions, which form the grounds of the Appellants' objections; and these objections are in no way altered by the general provision of the statute referred to.

The *Attorney-General* (Sir J. Campbell), and Dr. *Lushington* for the Respondents:—

With exception of the objection founded on the stamp laws, there is no other ground for maintaining that the principal interlocutor appealed from is erroneous, so far as it is favourable to the Respondents. The bond expressly declares that an account or certificate, signed either by the bank's principal accountant, or by the agent and accountant for the office where the cash account is kept, shall be sufficient to ascertain and constitute the balance against the co-

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obligors. As the balance now charged for is thus ascertained, there is no room for objecting to the regularity of the charge. The Appellants have not attempted to show that any part of the debt, for which the interlocutor finds them liable, was not truly advanced to Martin on the faith of the bond. On the contrary, in the reasons of suspension the Appellants state that the whole balance charged for is composed of money paid by the Respondents, or their agent, on drafts, which the Appellants allege to be in violation of the stamp laws. If therefore the objection founded on the stamp laws be shown to be untenable, no other ground remains upon which the Appellants can demand an alteration of the interlocutor.

Under the circumstances of this case, it is impossible to maintain that any part of the debt charged for is liable to objection under the stamp laws. By the Act 9 Geo. 4, c. 49, s. 15, the exemption previously conferred upon orders drawn on bankers residing within 10 miles of the place of issue, was extended to orders upon bankers residing within 15 miles. Even supposing all the other obstacles in the way of the Appellants to be got over, they would find the utmost difficulty in showing that any part of the balance now charged for arises from operations anterior to that statute. If, as the fact is, Lockerbie is within 15 miles of Dumfries, it follows that ever since the passing of this Act it has been quite lawful to pay at Dumfries unstamped drafts issued at Lockerbie.

But the conclusive answer to all the allegations of the Appellants is, that the Respondents have no occasion to found upon the drafts at all. Independently of the certified account, which sets forth only the sums truly advanced by the Respondents, the charge is fully supported by the annual doquets under the hand of

Martin himself, or of his authorised agent. Supposing that the question had arisen between the Respondents and Martin, it would have been in vain for him, in the face of his own doquets, to have founded on the allegations now brought forward by the Appellants. When the account was settled by the doquet, dated 13th April 1831, the drafts and other vouchers previously granted by Martin were given up, the balance due by him being sufficiently vouched by the doquet affixed to the account. The drafts in question not being founded on by the Respondents, and not being necessary as vouchers to support the charge, the Court was not called upon to look at them at all. As to the drafts themselves, it was not alleged by the Appellants that they laboured under any such *ex-facie* objection, as, if they had been founded on in judgment, would have rendered it necessary for the Court to reject them. There being no room for setting aside the doquet, on the ground that the balance struck was not warranted by the real pecuniary transactions between the parties, there could be no occasion for the Court interfering: *Barnes v. Hedley* (f). Although the original transaction in that case was tainted with usury, the Court felt themselves bound to give effect to a subsequent obligation to pay the principal sum actually advanced, with interest. Supposing the Appellants entitled to assume the character of sureties only, there is no ground for making any distinction between them and the principal debtor. It is not even alleged that the doquets were collusively arranged between the Respondents and Martin, or that he was disabled from granting them. Under such circumstances the Appellants are bound by the doquets.

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(f) 1 Campb. 157 and 180. S. C. 2 Taunt. 184.

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The annual settlement of the account being a matter of ordinary practice in all the Scotch banks, there was no occasion to call upon the Appellants to be present. It ought to be particularly observed that by the bond charged upon, the cash account is appointed "to be kept in name of me the said W. Martin, and the co-obligants bind themselves for all such sums not exceeding 5,000*l.* as shall be drawn out from the said bank by me the said W. Martin, or as may be contained, due, paid, payable, or claimable on any drafts," &c. (g). There is no other individual than Martin entitled to operate upon the cash account. The Appellants consented to be bound by his operations, and therefore he bound them by his annual doquets, equally as by any other operation under the cash account.

Another and a sufficient answer to any objection, as to the debt due under the bond, is afforded by the fact that the Respondents have been duly ranked on the sequestrated estate of Martin for the sum for which the charge has been proceeded on by the interlocutor. In the Scotch case of *Dickson v. Barbour* (h), it was held that cautioners for a composition under a sequestration are not entitled to dispute the validity of debts ranked on the estate. The Respondents are at a loss to discover upon what principle, while the decree of ranking remains unchallenged, the Appellants, as the cautioners of Martin, can competently maintain that the debt for which the Respondents have been so ranked is not truly due.

Sir *William Follett*, in his reply, admitted the extensive influence which a reversal of the decree of the

(g) See the bond, *ante*, p. 611.

(h) 6 Shaw & D. 856.

Court of Session might exercise on the banking system of cash credit hitherto pursued in Scotland, but contended that the obligations of the Stamp Act were imperative as to the bank, and decisive of the illegality of the drafts issued by Martin, upon which the whole question turned.

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Besides the cases already mentioned, and others which are commented on in the judgment, reference was made in the arguments on both sides to *Scott v. Gillmore* (i), *Preston v. Jackson* (k), *Waters v. Brogden* (l), and to the cases cited by Mr. Coventry in his book on the Stamp Acts, pp. 78 and 79, and by Mr. Chitty on Stamp Laws, p. 47.

Lord *Brougham* said he would take time to consider the case before he recommended a decision, and he would then deliver his opinion in writing, for the satisfaction of both parties, who, in common with the moneyed and mercantile interests of Scotland, seemed to look to the determination of this appeal as a precedent of considerable importance to that country.

Lord *Brougham* this day read his written judgment, as follows:—My Lords, the Scottish Banks, both public and private, have, for more than a century past, been in the practice of granting accomodation to their customers by way of cash credits. It consists in the opening of an account to a certain limited amount with a customer, on his finding good security for any balance which may at any time of settlement be found due. Upon this credit he operates by drafts on the bank, and these are honoured up to the specified

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(i) 3 Taunt. 226; but see *Spencer v. Smith*, 3 Camp. 9.

(k) 2 Stark. 237.

(l) 1 You. & J. 457.



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amount of credit during the whole period of the party's occasion for this accommodation. Interest is charged on the sums actually drawn, and thus the party only pays for what he actually uses, while he runs no risk of keeping money by him beyond the occasions of the day; and the bank runs little or no risk, because, besides the surety's liability, it has constant means of knowing the nature of the customer's dealings, and of inferring thence the state of his circumstances.

These credits are used, not only by traders, but by persons in any other occupation or profession, requiring supplies of money to a moderate amount, as cattle dealers, agents, and writers, and sometimes even by private individuals living on their means. W. Martin obtained a credit of this description with the Bank of Scotland in June 1819, and gave a bond for securing 600*l.*, in which he was joined by Mr. Swan, one of the Appellants, and others, formally and nominally as principal co-obligors, but in reality as his sureties. In September 1825 this credit was extended to 10,000*l.*, and the Appellants joined in a second bond, whereby they became liable in the same manner with W. Martin, but to the extent of 5,000*l.*, for all such money as should be drawn out from the said bank, or its agency office, at Dumfries, or as may be respectively owing, due, paid, payable, or claimable on any drafts, orders, bills, notes, receipts, guarantees, letters, obligations, or documents whatever, drawn, accepted, granted, indorsed, or any how signed by W. Martin, or on his procuration, or liable on him by any legal construction, and chargeable to the said account. And it was further stipulated by the bank in this bond, that any "account or certificate, signed by their principal accountant, or by their agent at Dumfries, should

be sufficient to ascertain, specify, and constitute the sums or balances to be due on principal and interest, and should warrant all execution of law against the obligors jointly and severally for such sums and balance" (*m*).

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W. Martin continued to operate on this credit until he became insolvent, and was sequestered in 1831, when a balance of 4,378*l.* 0*s.* 11*d.* principal, and 326*l.* 10*s.* 2*d.* interest, appeared due upon the account. The sureties or cautioners were sued upon the bond, and it was stated by them that the manner of drawing had been chiefly in two ways: W. Martin had sometimes sent letters from Lockerbie, where he resided, to the bank agent at Dumfries, directing him to send him money to a specified amount by the bearer; and sometimes he had discounted bills and entered into other transactions with various persons at Lockerbie, and given them drafts on the bank or bank agent. In order to save the stamp duty, it is alleged that he made them payable to bearer on demand; but as Lockerbie is said to be beyond the distance of the ten miles specified by the Stamp Act, he dated the drafts or checks at Dumfries, and generally post-dated them, as if drawn the day when the holders might present them for payment at the bank office. Doquets and balances certified by both the accountant and agent were regularly made and produced, and the cause was reported upon cases by the Lord Ordinary to the Lords of the Second Division, who directed a hearing in presence, and then decided that the suit being brought only on the second bond (that of 1825), the Respondents could not recover on the bond of 1819 in this action, but their Lordships decreed in their favour upon the former instrument.

Nothing here turns upon the form of the action,

(*m*) See extracts from the bond, *ante*, p. 611.

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which was a suspension of a charge given by the bank on the bond. The matters before stated as to the transactions were averred, and the facts alleged by the parties being in many, indeed in most, particulars denied on either side, nothing is to be taken for concluded or ascertained by the process, but the Respondents were sufficiently confident in their grounds of law to let the case be determined upon the fact of admitting, for argument's sake, the allegations of the Appellants; and as it was on this assumption that the Court decided, so it is upon this that the appeal is brought, and that your Lordships are called upon to determine the case.

It is to be regretted that some steps had not been taken to ascertain the facts, the more especially as the matter of law was, in the estimation of the Court below, sufficiently difficult to require cases and a hearing in presence. It does not seem that any difficulty could have attended this settlement of the facts, for nothing material was in dispute, except the fact of the drafts having been such as the Appellants contend they were, viz. payable at Dumfries, and drawn at Lockerbie, of their having been issued to parties whom W. Martin was paying money to, of Lockerbie being above the legal distance, and of the bank's agent being aware of all this; the facts probably being denied, only for form's sake, and which probably would have been admitted, or at least easily substantiated, if contested. What part of the balance was made up of money obtained on the drafts, and what part on letters sent for money to be transmitted from Dumfries by W. Martin's messenger, might probably have been ascertained with equal ease; and these are the only facts in the case. The consequence of settling these things would have been, that should the point of law be decided against the Respondents, the cause

would have been at an end. Whereas, if your Lordships reverse this decision, a new litigation will be necessary in case the chargers deny the suspenders' allegations. However, we have to deal with the case as it is now before us, and I regret to find that I cannot come to the conclusion at which the learned Judges below have arrived. On the contrary, I really hold it to be, without any reasonable doubt, clear, that upon the facts which the case for the Respondents assumes to be those of the cause, the bank could not recover upon this bond.

The whole question arises out of and turns upon the Stamp Act (55 Geo. 3, c. 184, s. 13), and we may at once lay out of view all that portion of the alleged balance or debt which arose from letters or orders, such as those set forth in the cases, namely, directions given at Lockerbie in writing to the bank agent to send W. Martin sums of money; I do not consider that these are drafts or orders for the payment of money at all. They are directions to send money to the party who either has it in the bank or takes it on credit from the bank; they are not negotiable instruments at all, and they are not issued, therefore they do not come within the description of instruments requiring a stamp, and they do not fall in any way within the provisions of the 13th section of the Act. But we are to consider the point argued and decided below, whether upon a balance arising out of sums paid by the bank to the bearers of unstamped cheques, issued at Lockerbie, beyond the privileged distance, the agent who honoured those cheques being cognizant of the distance and of the place of issue, the co-obligors or sureties in William Martin's bond of 1825 were liable to make good William Martin's deficiency, in other words, to pay the debt found due and arising out of

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such dealing. Now it must first of all be observed, that it seems mainly, though not exclusively, to be the ground upon which the Respondents rest their case, and the Court below their judgment, that the bondsmen had bound themselves by the certificate of the accountants or agents of the bank, and that whatever balance those persons should certify due was to be regarded as the true balance for which the bondsmen were liable to the bank. This argument seems to admit that, but for such a special provision between the parties, the want of a stamp would be fatal, but certainly something has been said of a more general nature respecting the difference between enactments for protecting the revenue and other statutory provisions.

We shall therefore begin by considering the question in its more general shape, and then inquire if the special obligation just adverted to makes any difference in the present case. First, there seems to be no reason at all to doubt, that if, for the purpose of protecting the revenue, anything is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it. Thus, if dealing in tobacco without a licence, as in *Johnson v. Hudson* (n), is prohibited under a penalty; this will not prevent the person who so deals from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But how would it have been if the legislature had provided, that besides the penalty, all dealing of the forbidden kind should be absolutely void? It is clear that in this case no action could arise from such void dealing, not because the law forbade the transaction for revenue pur-

(n) 11 East, 180.

poses, but because it deprived the transaction of all legal force and effect by making it void, and even if it had only been forbidden, with or without a penalty, provided the prohibition was for other than revenue purposes, no action could arise. Where there was no provision avoiding the transaction, but a prohibition framed to protect the buyer, an action was held not to lie, where that prohibition was broken: *Law v. Hodson* (o). So it was held that no action was maintainable for printers' work, where the Act requiring the printer's name to be given had not been complied with, not following a direction being held equivalent to disobeying a prohibition: *Bensley v. Bignold* (p). But a provision making void the transaction is quite as clear a ground of nullity, and quite as strong to defeat all legal remedy as any such prohibition. Be it so, that the provision is to protect the revenue, still if it operates not by penalty nor yet by mere prohibition, but declaring void what is prohibited, surely this is as immediate and direct a defeasance of all legal remedy as can be conceived. It is not, as in *Law v. Hodson*, a consequence drawn by argument from the statutory enactment, but it is the very enactment itself; it stands in the place of penalty; it is in truth the penalty denounced. The wrong-doer, the person breaking the law, forfeits 100*l.* and forfeits also the validity of his contract. He incurs two penalties, the fine and the nullity.

Now what does the Stamp Act provide? With reference to the present case the 13th section is precise. [His Lordship read the section, and called particular attention to the latter part of it, which he conceived to be a clear declaration of nullity or avoidance]; for [con-

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(o) 11 East, 300.

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tinued his Lordship] it goes on to provide, that “moreover,” that is, over and above forfeiting the penalty, “the banker or other person shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or from whom such bill, draft or order shall be drawn, or his, her or their executors or administrators, or his, her, or their assigns or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under her, him or them.” To say that a party shall not be allowed in account any money paid in a particular account, is equivalent to saying that the party shall have no claim against the payer or person on whose account or for whose behoof the money was paid, or, in other words, that no credit shall arise to the party, and, which is the same thing, no debt should be incurred towards him by the other person. The statute has, therefore, in terms, said that no debt shall arise from dealings contrary to the stamp provisions, and, in all but express terms, that whatever is done shall be void *quoad* creating a demand or claim by the party paying against the party receiving. This is anything, then, rather than a mere penalty protecting the fiscal regulation, or a mere prohibition with a view to such protection. It is a further and an additional protection given to the stamp revenue, declaring that payments upon unstamped instruments, made by parties knowing that the instruments do not come within the exemption, shall not be valid to the effect of charging the payee with a debt to the party paying.

Secondly, now what is the ground of the bank's action, of the charge given against William Martin's co-obligors or sureties? It is the debt alleged to be due from him to the bank in respect of his drafts upon the bank agent, honoured by him at Dumfries. But

if no debt is due, if the wrong-doer is forbidden from having claims against his customer in account, there is no liability incurred by the co-obligors, or indeed by W. Martin himself. That is, indeed, the immediate and direct consequence of the statutory provision. It is as if the statute had made void the bond to secure the balance from time to time due; for if there is nothing due, there is no balance—the obligation to make that nothing good itself amounts to nothing. The operation of banking is this: We speak of deposits by customers, and of their keeping money at bankers, but, both in fact and in contemplation of law, they give their money or securities for money to the banker, who becomes their debtor and is bound to repay it on demand. The operation of a cash credit is the reverse, the customer becomes the debtor to the bank by so much as the bank advances on his drafts, and the surety becomes bound to pay that debt if the customer fails. Then if the statute says no debts shall arise or become due upon money drawn out by the customer or paid by the bankers in a particular way, it also says that no bondsmen shall be liable on such a security given. It is as if the cash credit stood, and the bond for securing the balances stood, but nothing had been done under the credit, and so no balance had arisen or could arise which the bondsmen could have to make good.

But the peculiar form of the bond in this case is relied upon. It is said that whatever the accountant or agent should certify as the balance, is to be taken as that balance. How can this alter the case? They are to ascertain the quantum. The quantum of what? Of balance or debt due to the bank. But the Act of Parliament has said that there can, out of transactions of this kind, arise no debt whatever. Then

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there is no balance of a debt for the certifier to ascertain. The words, taken even most literally, will not bear out the contention of the Respondents. "Any account or certificate, signed as provided, shall be sufficient to ascertain, specify, and constitute—" What? not how much the obligors shall be bound to make good or pay, but "the sums and balances, such as aforesaid, to be due hereon in principal and interest, and shall warrant all executorials of law for such sums or balances." Now what are balances such as aforesaid? They are plainly balances in the transactions aforesaid, the drawing money out and paying it in; in a word, the balance of debt due from William Martin to the bank; and how are they further described? As "to be due hereon in principal and interest." This plainly means, due on this bond, by reason of the claims arising to the bank for money advanced on William Martin's cash credit, so that the obligation is to pay the debt and balance arising and due. If there is no debt, no claim, there is no obligation. The statute has taken away the debt, and the obligation vanishes with it. It is quite impossible to avoid regarding what it is that constitutes the obligation in the instrument, and what is the main purpose of it? It is that the obligors are bound to pay any debt incurred by William Martin to the bank on his cash credit. Now if there could be no debt, there must be an end of the obligation to pay.

Nothing can be more plain than that if such decisions as the present could be supported, the 13 sect. of the statute becomes at once a dead letter, as far as the nullity goes; for parties would only have to frame their securities like this bond, and then the unstamped cheques would constitute a balance available to the one party and payable by the other; for then it would

always be contended, and with success, that the party was not suing for money paid by unstamped drafts; that would be admitted to be impossible by virtue of the 13th section; but he would be represented as suing on the balance declared by the account, and the parties would thus be concluded, and the Court precluded from going into the fraudulent and illegal dealing which had rendered the whole transaction void, by prohibiting any claim or debt from arising out of it. All drafts, whether within ten or beyond a hundred miles, whether payable to bearer or not, whether on demand, at sight, or at six or eighteen months' date, would become valid, because a single bond executed would make the party drawing and receiving liable; without even paying for a bond stamp; a written memorandum agreeing to pay and with an agreement stamp, and that only affixed to it when it was to be put in suit, would suffice to legalize the whole transaction. As far as efficiency in law and equity is concerned, the statutory protection to the revenue of the nullity declared would be gone, and the penalty alone would remain. A recent case in the Court of Exchequer, *Owen v. Denton* (q), was relied on in the argument for the Respondent. But it is in no respect repugnant to the opinion which I have been giving. There a settling of accounts had taken place upon a selling of malt by an illegal measure. The Court admitted explicitly that such a sale could not either be enforced by action, or set off in defence against a claim, but they held that the settlement was equivalent to payment, and could not thus be set off. It is quite unnecessary to say whether this was or not a correct view of the law, and whether it let in or not

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a plain evasion of the revenue; at all events it does in no way conflict with the grounds of the present case, which stands wholly separate and apart.

I am, therefore, of opinion, and would move your Lordships, that the decree appealed from must be reversed, and that the case must be remitted with a declaration to this effect, "That no obligation arises upon the bond dated 28th September 1825, to pay any balance alleged to be due to the bank on W. Martin's drafts, so far as such drafts were drawn and issued beyond the statutory distance, or wrong dated in point of time or place, and were known by the agent of the bank to be drawn beyond such distance, or to be wrong dated in point of place, or to be wrong dated in point of time; and so far the Court of Session is directed to suspend the charge, and to find expenses due according to the result of the inquiry touching the manner in which the balance is constituted; and with this finding and direction, it is ordered that the cause be remitted back to the said Court to do therein as shall be just and consistent with this judgment."

The interlocutors were accordingly reversed so far as they were complained of, and the cause was remitted to the Court of Session, with a declaration in the above terms.

## A P P E A L

FROM THE COURT OF SESSION.

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May 14.  
July 6 & 17.Sir WILLIAM BAILLIE, Bart., and Others, *Appellants*.The EDINBURGH OIL GAS LIGHT COMPANY, *Respondents*.

By Act of Parliament, authorising a joint-stock company to raise 80,000 *l.* in shares of 25 *l.* each, the directors were empowered to make such calls for money on the subscribers to the undertaking as they should from time to time find necessary for the purpose of carrying on the same, but no such call should exceed 10 *l.* per cent., and one month at least should intervene between the calls. The directors brought an action against one of the subscribers for the amount of two calls made on his shares, on the same day, and that subscriber brought a counter action against the directors for the value of his shares as at a certain period, on the ground that they had, without his consent, engaged in speculations foreign to the company's undertaking, and at last abandoned that undertaking and united themselves with another company. Both actions were referred to an arbitrator under an order of Court; and he found, *first*, that the directors were entitled to decree for *the amount of the two calls*, with interest; *secondly*, that the subscriber was entitled to decree for a certain sum as the ascertained price of his shares, which sum, under deduction of what was awarded for the calls, he was *entitled to recover* from the company *on surrendering or transferring his shares* to them, or to any person they might direct; and he further found that the directors were entitled to reservation of any claim they might have against the subscriber for calls made subsequent to their action, and that the subscriber was entitled to reservation of his defences against such claims.

HELD by the House of Lords that the award was bad, inas-

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much as the first finding for the amount of two calls made in one day was contrary to the Act of Incorporation, which required the distance of a month at least between two calls, and the second finding was not final and conclusive, but held the subscriber entitled to recover the sum awarded to him upon condition only of transferring his shares.

*Semble*, the third finding, reserving subsequent claims of one party and defences of the other thereto, was not bad (though unnecessary), inasmuch as a reference of "all questions between the parties," by the practice in Scotland, is confined to the questions in the particular actions referred.

THERE are here two appeals at the instance of the same Appellants and Respondents (*a*). The interlocutors complained of were pronounced partly in an action raised by the Respondents against Mr. Clyne, solicitor in the supreme Courts in Scotland, for payment of the sum of 260*l.* with interest, being the amount of two instalments alleged to be payable on fifty-two shares of the capital stock of "The Edinburgh Oil Gas light Company," held by him. That company was incorporated in the year 1824, by an Act 5 Geo. 4, c. 76, intituled "An Act for the better lighting the City and Suburbs of Edinburgh with Oil Gas;" by the 12th section of which, the company was authorised to raise 80,000*l.* in 3,200 shares of 25*l.* each share. By the 52d section it was enacted, "That the committee of management shall have full power and authority, from time to time, at any of their meetings aforesaid, to make such call or calls for money from the several subscribers to and proprietors of the said undertaking, in order to *defray the expenses of or of carrying on the same, as they shall from time to time find wanting and necessary for*

(*a*) See the report, 10 Shaw, D. & B. 723.

*these purposes, until the sums subscribed are fully paid; but no such call shall exceed the sum of 10*l.* per centum, for or in respect of every share in the said undertaking, and so that no such calls be made but at the distance of one calendar month at least from each other, and so that fourteen days' previous notice at least shall be given of every such call, &c."* And it was provided by the 71st section, "That nothing in this Act shall extend or be construed to extend to authorise, nor shall it be lawful for the said company to manufacture or produce gas or inflammable air, or the products obtained in the process of making gas or inflammable air, from pit coal, cannel coal, or coal of any other species."

On the 12th of December 1825, the committee of management made two calls on the proprietors, each being for 2*l.* 10*s.* per share, payable respectively on the 10th January and 13th February 1826. These were the fifth and sixth calls, and the sums thus demanded on Mr. Clyne by these two calls, in respect of his shares, amounted to 260*l.* On his refusing to pay that sum the directors of the company brought an action against him in January 1827. Defences were given in for Mr. Clyne, in the month of November of the same year, to this effect:—That the calls in question were not made for the necessary purposes authorised by the Act of incorporation; that had the managers of the company confined their operations to what was authorised by that Act, no call would have been necessary after June 1825, as was stated at the annual meeting then held; and that if speculations had been gone into, and measures adopted which were not authorised by the Act, the expense of all such proceedings should be defrayed by those with whom they originated, but could not

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be charged against such members of the company as did not concur in them. It was in conclusion averred, that the calls now made had been occasioned solely by objects and pursuits not authorised by the Act, and which had no concern with the original object and proper business of the company.

While this action was depending the company resolved to abandon the manufacture of oil gas, and an offer having been made by the Edinburgh Coal Gas Company for purchasing their works and pipes, an agreement was entered into in March 1828, whereby the whole property belonging to the Oil Gas Company, except the sums due for calls on the proprietors and accounts due by customers, was sold to the Coal Gas Company for 1,000 shares of the latter company's stock, to be distributed among the proprietors of the Oil Gas Company, in proportion to the shares of the stock of that company, held by them respectively at the time of the agreement.

Subsequently to these transactions, Mr. Clyne raised a counter action for damages against the Respondents, alleging that by various proceedings taken by them as directors of the company, and which he particularly stated in his summons, they had violated the said Act of Parliament, and also the original conditions upon which he became a shareholder of the company's stock; and that having so acted, and having sold the property of the company without his consent, they were bound to repay unto him all that he had paid for his shares in deposits, premiums, and calls or instalments (of which he had paid four) with interest. The summons concluded for payment of 1,183*l.* 10*s.* 5½*d.*

To this action the Respondents gave in defences to this effect:—That Mr. Clyne was barred by acqui-

escence from questioning the proceedings, on which he libelled, as grounds of action against them: That under the circumstances in which the affairs of the company were placed at the time of their agreement with the Coal Gas Company, they were legally entitled to dissolve the Oil Gas Company, to dispose of their property, and to divide the proceeds rateably among the proprietors; and these measures having been effected in the way most beneficial for the shareholders at large, it afforded no relevant ground of action against the Respondents, that they were not consented to by an individual proprietor of stock: and that Mr. Clyne sustained no loss from the proceedings in question, but, on the contrary, had been greatly benefited thereby, and therefore his claim of repetition and damages was altogether unfounded.

This action was ordered by the Lord Ordinary to be remitted to the former action, but not conjoined with it; and some of the interlocutors complained of in the appeals were pronounced in them on the 30th of November 1830, and the 24th of May and 1st of June 1831. In pursuance of his Lordship's interlocutor of the last date, the following issues were proposed to be tried by a jury.—Issue in the cause in which the Edinburgh Oil Gaslight Company are Pursuers; and David Clyne, solicitor in the Supreme Courts, is Defender.—“It being admitted that by an Act of Parliament, 5 Geo. 4, c. 76, a company was established in Edinburgh, under the name of the Edinburgh Oil Gaslight Company, for the purpose of manufacturing gas from oil and other substances:

“It being also admitted that the defender was proprietor of fifty-two shares of the stock of the said company, during the months of January and February 1826;—

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“Whether the defender is indebted and resting-owing to the pursuers in the sum of 130*l.* sterling, or any part thereof, with interest thereon from the 10th day of January 1826, and the sum of 130*l.* sterling, or any part thereof, with interest thereon from the 13th day of February 1826, as the instalments or instalment on the shares of the said company, held by the defender as aforesaid?”

The issue in Mr. Clyne’s action, after admitting in like manner the formation of the company under the said Act, and stating that Mr. Clyne was an original partner of the company, and as such held twelve shares of the stock, on which he paid instalments, and that, between the 17th of January and the 21st of April 1824, he purchased forty additional shares of the stock, on which he paid certain instalments and premiums, concluded thus:—

“Whether, between the 19th day of January 1824, and the 15th day of May 1828, the defenders wrongfully violated the provisions of the aforesaid statute, and thereby became indebted to and are resting-owing to the pursuer in the sum of 1,183*l.* 10*s.* 5½*d.*, or any part thereof, with interest thereon, as the value of the shares of stock held by the pursuer, as aforesaid? or, whether the pursuer homologated or acquiesced in all or any of the said actings of the defenders?”

When these issues came on for trial, on the 19th of December 1831, the counsel for the parties, on the suggestion of the presiding judge, agreed to refer both causes, and subscribed accordingly a minute of reference in these terms:—“The parties agree to refer the two actions to Mr. John Boyd Greenshields, with full powers to determine all questions between the parties, and to determine the question of expenses, and they request the Court to interpose their authority to this minute of judicial reference.” “Failing Mr.

Greenshields, the parties agree to refer to any referee to be named by the Lord President."

Mr. Clyne, in the course of the same day, protested against the reference, alleging that he was not aware of the terms of it, and was taken by surprise. And he gave notice of motion, and moved the Court accordingly to discharge the reference, stating, as an additional reason, that Mr. Greenshields declined to accept it, which was the fact. But the Lord President, and the Lords of the First Division, before whom the motion was heard, by two interlocutors, dated respectively the 19th and 22d of December 1831, admitted the reference, and, by virtue of the power given in the said minute to the Lord President, named Mr. Duncan M'Niell, advocate, judicial referee, in place of Mr. Greenshields.

Mr. M'Niell accepted the reference, and after several meetings, at which he was attended by Mr. Clyne and the agent of the Respondents, he delivered his award on the 25th of May 1832, thus:—" *Primo*, I find that, in the action at the instance of the Edinburgh Oil Gaslight Company against Mr. Clyne, the pursuers are entitled to decret for 130 *l.* sterling, with legal interest thereof, from the 10th of January 1826, and for the further sum of 130 *l.* sterling, with the legal interest thereof, from the 13th of February 1826, being the two calls or instalments concluded for in the summons, at the instance of the said company, against Mr. Clyne, and amounting, the said two calls or instalments, with interest, to 289 *l.* 16 *s.* 10  $\frac{1}{2}$  *d.* at Whitsunday 1828. *Secundo*, I find that, in the action at the instance of Mr. Clyne against the Edinburgh Oil Gaslight Company, he is entitled to decree for 780 *l.* sterling, with the legal interest thereof from the term of Whitsunday 1828; but that the said com-

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pany is entitled to deduct therefrom the aforesaid sum of 289 *l.* 16 *s.* 10  $\frac{1}{4}$  *d.*, found due to them as at Whitsunday 1828, leaving a balance due by the said company to Mr. Clyne, at Whitsunday 1828, of 490 *l.* 3 *s.* 1  $\frac{1}{4}$  *d.*, which sum, with the legal interest thereof from Whitsunday 1828 till paid, Mr. Clyne is entitled to recover from the said company, upon his surrendering the 52 shares of the Edinburgh Oil Gaslight Company stock held by him, or transferring the same in favour of the said company, or of any person or persons they may direct, for their behoof. *Tertio*, I find that the Edinburgh Oil Gaslight Company are entitled to reservation of any claim they may have against Mr. Clyne for any calls or instalments subsequent to 13th of February 1826, paid by other partners of the company, but not paid by Mr. Clyne, and that Mr. Clyne is entitled to have his defences against any such claim reserved, and that the said company are not entitled to withhold or delay payment, in the meantime, of the said balance of 490 *l.* 3 *s.* 1  $\frac{1}{4}$  *d.*, and interest, or any part thereof, on account of any such alleged claim for subsequent instalments. *Quarto*, I find that neither party is entitled to expenses against the other party, but that both parties are conjunctly and severally liable to the clerk to the reference for his expenses and trouble."

Mr. Clyne again disclaimed the reference, and took several objections to the award, in a letter written to the arbitrator, a copy of which he sent to the agent for the Respondents. He also moved the Court to sustain his objections, and set the award aside. The Respondents, at the same time, moved to confirm it. And the Court, by two interlocutors, dated respectively the 21st and 28th of June 1832, ordered the award to be printed, and also the issues in the cause;

and printed copies to be put into the boxes of the Lords of the First Division ; and, after hearing counsel on the said motions, approved of the award, and interposed the authority of the Court thereto, and decerned against the parties for implement thereof to each other.

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Mr. Clyne died in November 1833, leaving a trust disposition, in which the Appellants were appointed trustees and executors, who, being accordingly sisted in his place in the actions, appealed from the above recited interlocutors of the Lord Ordinary, dated 30th November 1830, 24th May and 1st June 1831, the interlocutor of the Lord President, dated 19th December 1831, the foresaid interlocutor of the Lord President, and of the Lords of the First Division of the Court, dated 22d December 1831, and the interlocutors of the Lords of the First Division of the Court, dated the 21st and the 28th June 1832, as erroneous and contrary to law and equity.

The Appellants' counsel had just opened their case at the bar of the House, the 14th of May 1835, when, on the suggestion of the Lords then present, the appeals were withdrawn, upon terms consented to by the counsel of the parties, and embodied in an order of the House ; that order was afterwards rescinded upon petition of the Appellants' agents, stating, that he had not considered the import of the terms of compromise when the counsel consented to it, and the appeals were reheard on the 6th of July following.

The *Attorney-General* and Mr. *Tinney* for the Appellants:—It is evident, from the summons and defences, that the questions raised in both the actions were questions of law, and not such as could competently form the subject of a jury trial. That was the

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opinion of the Respondents themselves, as appeared from their application to the Lord Ordinary to remit the actions to his ordinary roll; and the judge who presided, expressed his opinion after the cases had been opened, that they were not fit for a jury trial. The interlocutors, therefore, remitting the actions to a jury were clearly wrong.

Mr. Clyne had the same objection to the judicial reference that he had to the trial by a jury; but having brought his witnesses and prepared his cases at great expense, he preferred on the day of trial to have the issues at once disposed of, because he knew that he could afterwards discuss the law before the Court. He protested against the reference as soon as he understood the true nature of the minute signed by his counsel, and, on the first opportunity, he moved the Court to rescind it. In principle, every reference of a judicial nature between litigants, being a voluntary contract to depart from the ordinary course of procedure, may be disclaimed and abandoned so long as the rights of the parties remain entire. Thus, where a judicial reference had been made to the oath of a party, which is one of the most solemn agreements of this description, it has been held that it may be departed from: *Chalmers v. Jackson* (b), *Bennie v. Mack* (c). Mr. Clyne's conduct throughout showed that he did not acquiesce in the reference; he was obliged to attend the referee by orders of the Court served on him, and he did attend from respect to the Court and to the referee, whom, notwithstanding, he considered as a commissioner merely to collect the facts and report, subject to the review of the Court. The whole proceedings, therefore, in remitting first to

(b) 18 February 1813, Fac. Coll.

(c) 10 Shaw, D. & B. 255.

the jury court, then to a referee, in opposition to Mr. Clyne's protest, was irregular, and was an attempt to force him into a compulsory reference, and thereby defeat his just claims, and render nugatory the law, which ruled the questions in dispute between the parties. The only question brought before the Court in both actions, was a question of law, proper to be disposed of by the Court.

The merits of the original action, as appearing on the record, did not form the ground of the last interlocutor of the Court below, any decision on the merits having been held to be superseded by the reference and award, to which the authority of the Court was without investigation interponed ; but the award as well as the reference was void, and did not form a competent ground of decision ; and the findings contained in it are as illegal as they are unjust, inasmuch as the two calls which the arbitrator sustained, being made on the same day, are contrary to the 52d section of the Act 5 Geo. 4, c. 76, which requires a month at least to intervene between two calls. The arbitrator, by his first finding, awarding their whole demand to the Respondents, and repelling the defences of Mr. Clyne, found by implication that the Respondents were entitled to dissolve the company without the authority of Parliament, by virtue of which it existed ; to alienate its property, and Mr. Clyne's interest in it, and at the same time to bring actions, as a supposed existing company, for calls, said to be authorised by the statute, although the calls were not made in terms of the statute, and the expenses which the calls were meant to cover were shown to have been incurred by undertakings and proceedings not warranted by the statute. This finding, which was contrary to the evidence, and unsupported by legal principle, affords

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a striking contrast to the second and third findings, by which the claim made by Mr. Clyne in his action against the company was disposed of. Mr. Clyne in his summons concluded for payment of 1,183*l.* 10*s.* 5  $\frac{1}{4}$ *d.*, money paid by him on the faith of the original articles of association and of the statute, the claim being made on the ground that the company was bound to refund to him the loss he sustained by their abandoning the original, and amalgamating with a new and different company. But the referee, in place of awarding the sums disbursed by Mr. Clyne, reduced his claim to 780 *l.*, and, by deducting the amount of the calls pursued for by the company, reduced it still further to 490 *l.* 3 *s.* 1 *d.* Instead of giving an immediate decree for that sum, a condition was introduced into the award, for which neither the summons nor the record gave any warrant, viz. that Mr. Clyne should be entitled to recover this reduced sum, only "upon his surrendering the 52 shares held by him, or transferring the same in favour of the company." This was a conditional finding, and Mr. Clyne, unless he complied with the terms of it, was denied all redress. The arbitrator had no right to go out of the reference, and introduce conditions which might avoid the award. The Courts have often set aside awards for faults of that sort. *Caruthers v. Hall* (*d*); *Johnson v. Cheape* (*e*); *Erskine B.* 4, tit. 3, s. 33; *Caldwell on Arbitrations*, 104; *Parker on Arbitrations*, 203.

The third finding of the award is also in terms and principle altogether unwarranted, as finding the company entitled to reservation of any claim they may have against Mr. Clyne for calls and instalments, subsequent to February 1826; such a reservation was

(*d*) 9 Shaw & D. 66.

(*e*) 5 Dow, 255.

prejudicial to Mr. Clyne, as implying a recognition of what is reserved. No reservation could have been asked, had the actions been decided by the Court, or by the jury; and the only object of the reference was, to dispose of the whole matter in dispute between the parties and prevent future litigation. The award does not give any effect to the conclusions of the action at Mr. Clyne's instance, as it finds only that he is "*entitled to recover*" a certain sum, and even that title to *recover*, by another action of course, is burdened with conditions of *surrendering* his shares, or of *transferring* them in favour of the company, or of *any persons* they may direct, and of a *reservation* of *any* claim the Respondents may have for *any* calls *subsequent* to those embraced in the action. The award on the whole is partial and unjust, is not final, and above all is contrary to law, and ought therefore to be set aside. *Corneforth v. Geer* (f); Caldwell on Arbitrations, 63.

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Dr. *Lushington* and Mr. *Bruce* for the Respondents :  
 —Mr. Clyne was liable under the statute, and *ex contractu* as a partner of the company, to pay the instalments concluded for, and the Appellants as his representatives are bound to fulfil his engagements. It is vain for them to object that Mr. Clyne was not a party to the order of reference, when they cannot deny that the minute of reference was signed by his counsel, in his presence, and it appears by the terms of it that the cases were referred to a "judicial referee," and not to a commissioner. If the submission had been by deed, expressed in the terms of this minute, could Mr. Clyne at his pleasure depart from its

(f) 2 Vern. 705.



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binding force, and convert the referee into a commissioner to report on facts?

The whole proceedings in the case show, that the parties were well aware that the matters at issue between them were submitted to the final decision of the referee, and on that footing all the pleadings on the part of Mr. Clyne, whether by himself or his counsel, were conducted.

Another objection of the Appellants is, that the award is not conclusive in the second and third findings. To that objection, there are sufficient answers: in the first place, the action at the instance of the Respondents, concluded for payment of those instalments only which had fallen due prior to February 1826; for those which have become payable subsequent to that period, no action has yet been brought, and as only the claims included in the mutual actions then pending were referred, it was incompetent for the arbitrator to decide any question not embraced in these actions. But even if it could be shown that the claim for subsequent instalments was included in the judicial minute, and therefore that the award was not conclusive as it did not dispose of them, that circumstance could form no objection to the award, which is valid so far as it decided points truly embraced by the reference: *M'Leellan v. M'Leod* (g); Erskine, B. 4, tit. 3, s. 35. But the chief objection to the award is, that it was *ultra vires*, in other words, that the referee exceeded his powers in ordering Mr. Clyne to surrender his shares even conditionally, inasmuch as the action contained no conclusion to that effect. In referring to the summons in Mr. Clyne's action, your Lordships will find

(g) 4 Wils. and Shaw, 158.

it to be grounded in the Respondents' liability to refund to him all the sums paid by him in respect of his shares. With regard to the agreement with the Coal Gas Company, which is one of the grounds of that action, the Respondents, on behalf of the company, were not only justified, but bound to suspend the manufacture of oil gas when they discovered that it was disadvantageous and unprofitable to the shareholders. They were also justified in accepting the offer of the Coal Gas Company, but the powers of the company given by statute were not disposed of, and the company still exists as the Appellants know, for they have raised an action against the Respondents in their corporate capacity. But if it were possible to dispute the legal right of the company in the circumstances in which they were placed, to abandon the undertaking for which the company was incorporated, and to dispose of their property in the manner they did, still the Appellants, in order to succeed in their claim against the company, must, at all events, prove that they have suffered damage in consequence of the proceedings complained of. Was not that a proper jury question, depending on the evidence adduced by the parties? The Lord Ordinary, when he sent the case to the jury court, was of opinion that the question was proper to be decided by a jury, and it was in that view that the arbitrator made his award on Mr. Clyne's claim.

Mr. Clyne having acquiesced in the proceedings of the Respondents, on which he libelled as grounds of action against them, his representatives are barred from challenging these proceedings; and at all events, as they sustained no loss from the proceedings complained of, they are not entitled to claim repetition to any greater extent than the fair value of the shares

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of stock held by Mr. Clyne, at the date of the agreement with the Coal Gas Company. The Respondents having neither infringed the provisions of the statute whereby the company was incorporated, nor deviated from any subsisting contract, are not liable to the Appellants beyond that value, as found by the judicial referee.

The parties having entered into a judicial reference, by which they agreed to refer the two actions to the decision of a referee, who pronounced the award to which the authority of the Court was duly affixed, the Appellants are bound to put in force that award. A judicial reference is a contract, by which parties agree to submit the subject-matter of a depending action to the amicable decision of an arbitrator, and oblige themselves to acquiesce in his decision. The agreement is entered into under the authority of the Court, on a joint minute presented by the parties, praying their Lordships to admit the reference, and to interpose their authority thereto. On considering this minute, the Court pronounces an interlocutor, remitting the case to the referee named, whose judgment is final, and is not subject to review in any Court, except in an action of reduction on the grounds of corruption or fraud, or that the arbitrator exceeded his power: Ersk. B. 4, tit. 3, s. 35.

The arguments for the Respondents on the validity of the award are noticed in the judgment.

When the arguments at the bar were closed—

Lord *Brougham* said, I have no doubt upon two points raised for your Lordships' consideration in these appeals: first, with respect to the two calls, whether in regard to the amount being twenty per cent. instead of ten, or the calls being two at the same time,

instead of two at the distance of one calendar month at least between them; that point, it is said, was not included in the issue; and if it be said that the issue did not leave that point to be decided by a jury, I do not see what was sent to be tried, except that very point. Nevertheless, I think if it be something less or more than was necessary, it is, in point of fact, the same amount that was left to the jury by the issue; and therefore the objection seems, in another stage of the proceedings, in substance to come to the same thing; namely, that the Lord Ordinary, instead of sending an issue of fact and of law, which is the objection, should send no issue to be tried at all, when facts enough were admitted to raise a point of law, which, I think, the Court ought to have taken and decided, whether these calls were or were not contrary to the fifty-second section of the Act of incorporation of the company.

The other point, on which I have no doubt in certain respects, is, that the award is not final, and that it does not direct anything specific or positive to be done, but merely that upon one party doing something, something is also to be done by the other party; if Mr. Clyne chooses to give up his shares, and divest himself of that property, the company shall pay him so much. It is in vain to argue that this direction was the same as a direction to a party to do so and so, upon another party producing letters of administration; or that it is like the case of a party who is directed to do so and so upon a discharge being executed to him. It is in vain to say, as has been ingeniously put in the argument at the bar, that it is the same as directing a cautioner to do so and so upon the assignment to him of the principal obligor's interest. It is in vain to say that any of the

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three cases so put is at all the same as, or at all like to the one in question in this award. There was no necessary connexion between the arrangement which the arbitrator was in the course of directing, and Mr. Clyne's divesting himself of his property in ceasing to be a shareholder. The award did not direct him to give up the shares; it only said if he chooses to get out of the situation of shareholder, he can divest himself of the joint-stock property, and assign over, or give up, the shares to the company, and the company shall do so and so. That is a perfectly different matter, and ought to be made the subject of a specific direction binding Mr. Clyne obligatorily, not binding the company, in the event of Mr. Clyne executing the directions of this award, whatever they might be.

I have no doubt whatever upon that objection to the award, but there are two other matters which I wish to take time to consider, especially as raising another objection of a more specific nature, from which it appears still clearer that the award was not final, namely, the objection which applies to the calls, that the reservation is bad. Now if this was a general submission of the cause and all matters in difference, or, what comes to the same thing, a submission of all matters in the cause, with a power to the arbitrator to whom that reference was made to dispose of all questions between the parties—if that be not in Scotland, it would certainly be with us, a general reference of all matters in dispute between the parties, as well out of the cause as in the cause pending. But I am not quite clear that the form of the direction, perhaps from the wording of it, makes it a final proceeding; for it is reserving all questions touching shares and calls, which calls have been made during the intervals between the actions brought

and the date of the reference. But it is said that is not the course, and, in fact, that there could be no such reference by the practice in Scotland. I shall inquire as to that practice; for if so, this other consequence follows, which indeed is not repudiated, but expressly stated to be Scotch law; that, if the word "other" had been inserted for the express purpose of showing that all other matters, as well as those pending in this suit, were referred to arbitration, the use of the distinct word, "other," would still only amount to a reference of the subject-matters in dispute in the cause. I apprehend the word "other," by the Scotch language, means all other questions than those in the cause, or it means nothing. I should be surprised to find the practice to be otherwise, as it would be giving a technical sense in opposition to the obvious meaning of the word in common sense; I shall therefore take the opportunity of satisfying myself upon this, which is a point of importance in practice.

The only other point that remains to be considered is, as to the effect of the arbitration, whether it extends to these other suits brought for subsequent calls; and it is the only other question that arises (if I should be of opinion against the Appellants on the former) upon the construction of the award, and, consequently, upon the import and effect of the third finding of the arbitrator, I mean the question of the reservation of claims and defences as to subsequent calls. There is upon the face of the award a point of law, namely, the application of the construction of the fifty-second section. If I come to an opinion against the Appellants on those views, both upon the meaning of the reference, which prevents the effect of the third finding, and upon the passage importing a

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legal question out of the summons into the award, and there dealing with it as a point of law arising upon the construction of the fifty-second section, there is an end of the case; but if I am with them upon the second point, and against them on the first, if they can raise the question about the summons, then the only further question will be—I being of opinion the second call is bad at all events—whether or not the first call is good. That raises the question which has been argued. It is not said the company may not have two calls on the same day, but that they are not allowed to have more than ten per cent.; that raises this question, whether if a call of ten per cent. has been paid on the 10th of January, and another upon the 15th of February, it is not an evasion of the clause for raising money, in which the company was tied down closely?

July 17.

Lord *Brougham*.—My Lords, in this case I stated, at considerable length, when the arguments had closed, the views which I took of the two most material parts of it, and I stated the reasons why it appeared to me to be impossible to agree entirely with the judgment which had been pronounced below upon the former part of the case, affirming in all respects the award of the arbitrator. It appeared to me that the award was not final, in respect of the second finding, which did not give a positive direction to Mr. Clyne to surrender his shares, but only a conditional order, which imported that if he thought fit he might surrender them, upon receiving from the company the compensation stated. But a question also arose, whether the third finding was not equally defective in point of conclusiveness, as it reserved to one of the

parties all right of action with respect to the other calls, which had not become due at the time the submission to arbitration was entered into. This question depended upon whether or not we construed the words of the reference, as importing a submission to arbitration of all matters in dispute between the parties, or only a submission to arbitration of the matters in dispute in the action already brought, and which was then referred. The words of the reference were, "The parties agree to refer the two actions to, &c., with full power to determine all questions between the parties," &c.; and it appeared to me that this was a reference of all matters in dispute; it undoubtedly would have been so with us in our Courts here, being our, and perhaps the most ordinary, mode of making a general reference to arbitration. If we refer all matters in dispute in a cause, that, of course, is only a submission to arbitration of the cause itself, and nothing more than is in dispute in that cause; but if we refer—which is usual when a general reference is intended—"this cause, and all matters in difference between the parties," or, "this cause, and all questions between the parties;" these words import a general reference.

I find, however, upon further consideration and examination of the authorities, and, above all, on a very instructive communication which I have had with some of the learned judges in the Court in Scotland, that there is something peculiarly technical and strict in what is called "a judicial reference," in Scotland. It is stated to be an act of the Court—not to take the cause out of the Court; the Court is understood still to retain its control over it, but the mode of inquiry and the manner of trial alone is changed by the reference, and the *forum* of the arbitrator is, in

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this restricted sense, and subject to the control of the Court, substituted for inquiry by the Court itself. I will not stop to inquire how far this view finds resemblance or analogy in our references under the statute of William 3 (*h*), making the submission a rule of Court; but, at all events, this is certain, that the course of proceeding in Scotland is so strict, and its incidents are so construed, as to make these words of reference, or words of reference similar to those used here, bear a construction materially different from what they would have with us, so that referring "the cause and all questions," or even "the cause and all *other* questions," but certainly referring "the cause and *all* questions between the parties" to arbitration, only imports, in Scotland, that the generality of all questions is to be construed according to the special matters immediately preceding, and that "all questions" in such a reference must be taken to mean "all questions in dispute between the parties in the cause referred;" that is to say, it is a reference only of all matters in dispute in that cause. This construction of the terms of the reference, therefore, removes all questions which may arise as to the conclusiveness of the award in this latter branch—the third finding; but it leaves the want of conclusiveness in the second branch or finding exactly where it was, and that is sufficient to prevent the interlocutors of the Court below from standing, which interlocutors confirmed the award generally.

With respect to the first branch of the award, that touching the two calls and interest on them, and in which the award was made against Mr. Clyne, I stated, after the argument, my opinion that one, at

(*h*) 9 & 10 Will. 3, c. 15.

least, of those calls was not exigible, inasmuch as the fifty-second section of the Act 5 Geo. 4, c. 76, requires that a month or more shall intervene between the making of any two calls; and those calls, even though the payments under them were to be made at an interval of more than a month, were nevertheless contrary to the Act, as both were made on the same day and were for more than 10 per cent. I formerly stated at greater length, the reasons why this was not a compliance with, but an evasion of the provisions of the Act, and an evasion of it in one of its most important particulars—that of a right to make calls on the shareholders for payments to the company. But the first of these calls does not appear to me to fall within the same objection; and therefore I am of opinion that one of those calls was duly made, inasmuch as it is not denied that above one calendar month had elapsed from the last preceding call. The result of this will therefore be, that the finding of the arbitrator in the action by the company against Mr. Clyne, may be reduced by one half, and that instead of 289*l.* 12*s.* 10  $\frac{1}{2}$  *d.*, only 144*l.* 16*s.* 5  $\frac{1}{2}$  *d.* will be payable by Mr. Clyne's executors to the company, including principal and interest. It is upon an error in law that I hold this part of the award to be erroneous, and the error in law, though it does not appear in express terms upon the face of the award, yet appears by the award, taken together with that to which the award refers, and which by that reference must be taken to be imported into it; consequently there is here just as much error in law as if that error in law had appeared upon the face of the award. The result of the argument with respect to the inconclusiveness of the award, of course, is, that the interlocutor must be set aside requiring the payment from the company

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to Mr. Clyne of 780*L.*, from which the company also was allowed to deduct that which was found due by Mr. Clyne to the company under the first head, and in the first action. As there will now be no payment to be made by the company to Mr. Clyne, or his representatives, of course there is no occasion for mentioning the deduction.

But I have to make one observation, which appears to me to be of importance, because it tends to prevent these proceedings from being carried on further than the stage which they will reach on the reversal and remit, which I shall recommend to your Lordships. What the arbitrator intended to direct is very clear, though he failed in accomplishing his object, by a defect not only in form, but in substance of his directions. If he had directed—which in all probability he meant to do—that Mr. Clyne should surrender his shares, and that the company should make him compensation, then the whole direction would have been right. I have looked into the facts of the case, and as far as I understand them, I am of opinion that such would have been so far a right award, and that had it been so made, the Court would have been right in confirming it. When this matter goes back to the Court below, the probability is, that the party against whom the award was made will not choose to refer at all; but whether by reference and an award, or by the Court itself dealing with it, a similar judgment is, in my opinion, likely to be arrived at. As at present advised, I think that judgment, if it is come to, will be unimpeachable, and any different judgment will be wrong. If, therefore, the result of the present reversal and remit will be, that the same conclusion will be arrived at which I have already stated my belief to have been the intention of the arbitrator and of the

Court below to have come to, that conclusion ought, I think, to stand ; and if it should be brought here by appeal, the party so appealing will, very probably, not only have the decision here against him, but will also have to pay the full costs of that proceeding.

The best course for your Lordships now will be, to alter the interlocutors complained of in the manner which I have already described, the consequence of which will be, that the award will be set aside, and the Court below will be left to proceed with the causes as they shall see fit ; the Appellants being directed to pay the sum of 144*l.* 16*s.* 5*d.*, as I have already stated, as one call, with interest.

It was ordered accordingly, “ That the interlocutors complained of in the said appeal (the first) be, and the same are hereby reversed ; and it is found and declared that in terms of the 52d section of the Act (5 Geo. 4, c. 76), it was not competent to the company, thereby incorporated, to make two calls for money from the subscribers to, and proprietors of, the said undertaking at one and the same time ; and that it was by the said Act enacted, that no such calls should be made but at the distance of one calendar month, at least, from each other. And it is further declared, that instead of making two calls for 130*l.* each, upon the shares held by the said David Clyne on the 12th day of December 1825, it was not competent to the said company to make more than one of such calls at one time. And it is therefore further ordered, that the said cause be remitted back to the First Division of the Court of Session in Scotland, with instructions to the said Court to set aside the award of Mr. Duncan M’Niell, mentioned in the said appeal, in terms of this judgment, finding, and declaration ; and to find the

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Appellants liable in payment to the first instalment or call on interest since the same became further therein as may be just this judgment."

And in the second appeal it the interlocutors complained of i and the same are hereby reversed ordered, that the said cause be r First Division of the Court of Sess instructions to the said Court to of Mr. Duncan M'Niell mentione and to proceed further therein consistent with this judgment (i).

(i) 47 Journ. 30

## A P P E A L

FROM THE COURT OF CHANCERY.

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Aug. 14, 15.  
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JAMES ACKERS (an Infant, by N. C. } *Appellant.*  
 MILNE, his Guardian) - - - - }

SOPHIA PHIPPS (*a*), Widow - - - - *Respondent.*

A testator devised all his freehold, copyhold, and leasehold messuages, lands, tenements, rents, and hereditaments, and all other his real and personal estate, whatsoever and wheresoever, not before disposed of, to trustees, with power to sell and absolutely dispose of, or to exchange or let, all or any part or parts of his said estate, upon trust, as to a certain part, to convey and assure that part to his godson, G. H. A., when and so soon as his godson should attain 21; and also to pay to G. H. A. 7,000 *l.* upon his attaining 21. But in case G. H. A. should die without issue before attaining 21, then the said part of the real estate, together with the 7,000 *l.*, was to sink into and become part of the residue, and to go according to the disposition thereof, thereafter in the will expressed. As to the rest, residue, and remainder of his personal estate, he directed it to accumulate at compound interest until J. C. A. should attain 24 years, then upon trust to convey, assign, &c. unto J. C. A. (upon his giving such security, and executing such deeds for the payment of annuities before bequeathed to other persons, as should be to the satisfaction of the trustees) all the legal estate and interest of and in all the freehold, leasehold, and copyhold lands, tenements, rents, and hereditaments, and all other the testator's

*Will.*  
*Construction.*

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(*a*) The appeal had abated before the hearing by the death of this Respondent, and was revived by an order of the House in her executors and devisees.

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real and personal estate, whatsoever and wheresoever, not thereinbefore devised and bequeathed. HELD, that this gift to J. C. A. displaced the heir at law as to the residuary gift of real and personal estate; that J. C. A. took a vested interest in the intermediate rents and profits, and that the words respecting his executing deeds and assurances did not constitute a condition precedent.

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**JAMES ACKERS**, by his will, dated the 13th of April 1822, after directing his debts and funeral and testamentary expenses to be paid out of his personal estate, gave and bequeathed to his wife, Anne Ackers, for her life, his capital messuage or dwelling-house, with the out-buildings, gardens, land, and appurtenances thereto belonging, situate at Lark-hill, within Salford, in the county of Lancaster, which he held, together with other land, by lease from the Earl of Derby; and also the use of his household and other goods, furniture, plate, &c., which should be found in his said dwelling-house at the time of his decease; and in case of the death of his said wife before his interest in the premises should expire, then he directed that the said dwelling-house, land, and premises, and the household goods and chattels, should revert to his executors, and be applicable to the purposes of his will, thereafter set forth, concerning his personal estate. The testator then gave several pecuniary legacies, which he directed to be paid, some within one year, and others within three months after his decease; and he gave and devised all his freehold and copyhold messuages, lands, tenements, rents, and hereditaments, and moieties, parts and shares of messuages, lands, tenements, rents, and hereditaments, whatsoever and wheresoever, situated, standing, lying, arising, and being in the United Kingdom of Great Britain and Ireland;

and also all and every his leasehold messuages, lands, tenements, rents, and hereditaments respectively, and all other his real and personal estate and effects, whatsoever and wheresoever, not thereinbefore disposed of, unto Edward Hobson and Benjamin Williams, their heirs and assigns, for ever, or for such other estate or estates as he had therein respectively, upon trust, as to his said lands, hereditaments, and real estates, that they, his said trustees, should keep and continue the same in good repair, and set, let, and manage the same for the utmost benefit and advantage; and upon further trust and direction, that it should be lawful for them, at any time or times after his decease, to sell all or any parts of his real estate (except the messuage and premises devised to his wife, during her interest therein, and also the land, hereditaments, and premises thereafter devised to his godson, George Holland Ackers), and to convey the fee-simple thereof to any person or persons whomsoever, either in parcels for building upon, or otherwise improving the same, at such yearly, chief, or other rents, as they his trustees should think fit; and that when any of the said premises should be sold, the rents to be reserved upon such sales should be vested in the trustees upon the trusts in his will expressed, concerning his real estate. And he empowered his trustees to exchange any of his said lands and hereditaments for other lands, and to make partition of any lands of which he was joint proprietor, and he directed that the lands to be taken in exchange or divided should become vested in his trustees upon the trusts of his will, and that the monies to arise from the sale or sales of his estates should be added to his personal estate; and as to his personal estate, money in the public funds, money out at interest, and securities for money, rents, arrears

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of rent, goods, chattels, and effects of what nature or kind soever, not thereinbefore specially bequeathed, he gave and bequeathed the same to his said trustees, their executors, administrators, and assigns, upon trust, in the first place, to pay thereout to his said wife an annuity of 3,000*l.* for her life, &c.

The will then proceeded thus, "And as to, for, and concerning all my messuages, lands, and premises, situate, lying, and being in Wheelock, in the county of Chester, purchased by me from Mr. Hillidge and Mr. Lockett, they my said trustees, and the survivor of them, and the heir of such survivor, shall stand seised and be possessed thereof, in trust, and to the intent and purposes, to assign, convey, and assure the same unto my godson, George Holland Ackers, eldest son of my nephew, George Ackers, *when and so soon as he*, my said godson, shall attain his age of 21 years; and also do and shall pay unto my said godson, George Holland Ackers, the sum of 7,000*l.* at *and upon his attaining* his said age of 21 years. But in case my said godson, George Holland Ackers, *shall depart this life before he attains the said age of 21 years, without leaving issue* of his body lawfully to be begotten, then, and in such case, the said messuages, land, and premises, in Wheelock aforesaid, hereinbefore given and devised to him, together with the said sum of 7,000*l.*, shall sink into and become part of the residue of my real and personal estate, and go according to the disposition thereof, hereinafter expressed and contained."

The will continued: "And as to the rest, residue, and remainder of my personal estate, not by this my will specifically disposed of, upon trust, that they my said trustees, and the survivor of them, his executors and administrators, do and shall, after payment thereout of all my just debts, funeral, and testamentary

charges, and all annuities and yearly sums of money, and legacies given by this my will, together with all such sum and sums of money as may be necessary for the management and repairs of my real and personal estate, invest the overplus in the Parliamentary stocks or public funds of Great Britain, or at interest upon government securities in England, to be altered and varied as they, my said trustees or trustee, shall think proper, and that the resulting income and produce thereof may be accumulated by way of compound interest, until James Coops, son of Ann Coops (some time ago residing in Salford), and which said James Coops was born on or about the 4th day of August in the year 1811, shall arrive at and attain the age of 24 years; then upon trust, that they, my said trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, shall convey, assign, transfer, pay, and make over, by proper and effectual conveyances, transfers, payments, and assurances in the law, unto the said James Coops, upon his giving such security, and executing such deeds and assurances, to the satisfaction of the said trustees or trustee for the time being, or as their or his counsel shall advise, for the regular payment of the said several annuities hereinbefore bequeathed, all the legal estate and interest of and in all my said freehold, copyhold, and leasehold messuages, lands, tenements, rents, and hereditaments, and moieties, parts, and shares of messuages, lands, tenements, rents, and hereditaments, situate, standing, lying, arising, and being in the United Kingdoms of Great Britain and Ireland, and all other my real and personal estate and effects, whatsoever and wheresoever, not hereinbefore given, devised, and bequeathed."

The testator then directed that his trustees should

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of rent, goods, chattels, and effects of what nature or kind soever, not thereinbefore specially bequeathed, he gave and bequeathed the same to his said trustees, their executors, administrators, and assigns, upon trust, in the first place, to pay thereout to his said wife an annuity of 3,000*l.* for her life, &c.

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The will continued: "And as to the rest, residue, and remainder of my personal estate, not by this my will specifically disposed of, upon trust, that they my said trustees, and the survivor of them, his executors and administrators, do and shall, after payment thereof of all my just debts, funeral, and testamentary

when he shall have attained the age of 24 years, &c. ; and in default of such issue, in trust for all and every the daughter and daughters, and their heirs, of my said nephew, George Ackers, equally to be divided among them, &c., nevertheless, only to take when she or they shall have attained the age of 21 years ; and in case my said nephew, George Ackers, shall depart this life without leaving such son or sons, daughter or daughters, hereafter to be born, or that he, she, or they shall have respectively departed this life, if a son, under 24 years, and if a daughter, under 21 years of age, then upon trust for my said godson, George Holland Ackers, when and so soon as he shall have attained his age of 24 years." Then followed a proviso, that in case there should be no such son or daughter of the testator's said nephew, thereafter to be born, or that G. H. Ackers should die before attaining the age of 24 years without issue, lawfully to be begotten, the trustees should divide the whole of the testator's real and personal estate not before disposed of into three equal parts, each part to be divided equally among the children who should be then living of the testator's late uncle and aunts, T. Singleton, Elizabeth Halsall, and Ann Bayley, respectively. And the testator appointed the said Edward Hobson and Benjamin Williams executors of his will.

The testator afterwards made a codicil to his will, which, however, did not affect the devise of the real estate ; and he died, without otherwise revoking or altering his will, on the 23d of May 1824, leaving Sophia Phipps (the Respondent) his heiress-at-law, and the said James Coops and George Holland Ackers, both infants under the age of 21 years, him surviving. Ann Ackers, the testator's wife, died in his lifetime.

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place James Coops at school, and give him an education at one of the universities, and pay for his maintenance and education such sum or sums out of the income of the testator's personal estate as they should think necessary, not exceeding 800*l.* a year, until he should attain the age of 21 years; and after attaining that age, then that the trustees should increase the allowance from 800*l.* to an amount not exceeding 1,500*l.* a year, until he attained the age of 24 years; and the testator further directed, that the said James Coops should from and after the testator's decease take and use the surname of "Ackers" only, in addition to his Christian name. The will then proceeded: "But in case the said James Coops shall depart this life before he attains the said age of 24 years, without leaving issue lawfully begotten, then upon trust, that they, my said trustees, and the survivor of them, &c., do and shall, in like manner, assign, transfer, pay, and make over, by proper conveyances, payments, and assurances (subject nevertheless to the payment of the said annuities and yearly sums of money hereinbefore bequeathed, and also to the life estate of my said wife, in my house and premises at Lark-hill,) unto such son of the body of my said nephew, George Ackers, lawfully to be begotten and hereafter to be born (exclusive of my said godson, George Holland Ackers, and his heirs), when he shall attain the age of 24 years, all that and those my real and personal estate, of what nature or kind soever; and in default of such son, in trust for the third, fourth, fifth, sixth, and all and every other son and sons of the body of my said nephew, George Ackers, lawfully issuing and hereafter to be born, successively and in remainder one after another, as they and every of them shall be in priority of birth, &c., such son and his heirs lawfully begotten, nevertheless, only to take

when he shall have attained the age of 24 years, &c. ; and in default of such issue, in trust for all and every the daughter and daughters, and their heirs, of my said nephew, George Ackers, equally to be divided among them, &c., nevertheless, only to take when she or they shall have attained the age of 21 years ; and in case my said nephew, George Ackers, shall depart this life without leaving such son or sons, daughter or daughters, hereafter to be born, or that he, she, or they shall have respectively departed this life, if a son, under 24 years, and if a daughter, under 21 years of age, then upon trust for my said godson, George Holland Ackers, when and so soon as he shall have attained his age of 24 years." Then followed a proviso, that in case there should be no such son or daughter of the testator's said nephew, thereafter to be born, or that G. H. Ackers should die before attaining the age of 24 years without issue, lawfully to be begotten, the trustees should divide the whole of the testator's real and personal estate not before disposed of into three equal parts, each part to be divided equally among the children who should be then living of the testator's late uncle and aunts, T. Singleton, Elizabeth Halsall, and Ann Bayley, respectively. And the testator appointed the said Edward Hobson and Benjamin Williams executors of his will.

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The only child of his said uncle, Thomas Singleton, living at the testator's death, was George Singleton. The only children then living of the testator's aunt, Elizabeth Halsall, were John Halsall, and Ellen, the wife of Richard Mayor, and the only child of the testator's aunt, Ann Bayley, living at his death, was Ann Cottom, widow, who died in August 1824, leaving Robert Cottom, her eldest son, and heir-at-law, who obtained letters of administration of her estate and effects. Edward Hobson having by deed renounced and disclaimed the will, Benjamin Williams alone duly proved the same in October 1824.

Sophia Phipps (the Respondent) filed her bill in Chancery in October 1831 against the said Benjamin Williams, James Coops, then calling himself James Ackers (the Appellant), George Holland Ackers, George Singleton, John Halsall, Richard Mayor and Ellen his wife, and Robert Cottom, stating the facts above stated; and, among other things, that the testator was, at the respective times of making his will, and of his death, seised in fee of various lands in the townships of Manchester and Salford, and of Chorlton-row, jointly with Holland Ackers, deceased, in undivided moieties, as tenants in common; that these lands had been bought by them for the purpose of being sold again in parcels for building upon, and that contracts had been entered into by the testator both before and after the date of his will for the sale of these parcels, in consideration of certain rent-charges in fee issuing and payable out of the respective plots. And the bill further stated, that B. Williams, upon the death of the testator, took upon himself the execution of the trusts reposed in him by virtue of the will, and entered into possession and receipt of the rents and profits of the lands devised by the will, upon

trust to convey the same to James Coops when he should attain 24; and that the rents received by B. Williams, in respect of the premises at Wheelock; and the rents received by him on account of the other estates before mentioned, amount respectively to several thousand pounds. The bill prayed that it might be declared that the plaintiff was entitled to the rents and profits of the lands, &c. situate at Wheelock, from the death of the testator, until such time as the defendant, George Holland Ackers, should attain 21 years of age; and that it might likewise be declared that she was entitled to the rents and profits of the freehold lands and hereditaments in the will mentioned to be devised to the Appellant, until such time as he should attain 24 years of age. And for an account, &c.

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The Appellant and George Holland Ackers appeared separately to the bill by their respective guardians, and put in demurrers thereto for want of equity. These demurrers came on to be argued before the Vice-Chancellor, and his Honor, by two several orders, dated the 19th of December 1831, overruled the demurrer of this Appellant, and allowed the demurrer of George Holland Ackers (*b*).

This was an appeal against the order overruling the demurrer of James Ackers.

Sir *C. Wetherall*, for the Appellant:—The question is, whether the intermediate rents and profits are to go according to the trusts of the will, and accumulate for the benefit of the infant, or to pass to the heir-at-law? This question must be answered in the affirmative. The general rule of law is, that in a devise

(*b*) See the case reported under the name of *Phipps v. Williams*, 5 Sim. 44.



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like the present, which is an immediate devise, liable to be divested, the right vests at once, and the intermediate rents are taken : *Borastone's case* (c) ; *Doe v. Moore* (d) ; *Doe v. Nowell* (e) ; *Farmer v. Francis* (f) ; *Chambers v. Brailsford* (g) ; *Stanley v. Stanley* (h). If the testator has not directly devised them, he has done so by necessary implication. In the first part of the will, the testator speaks of " the capital messuage or dwelling-house, garden, land, and premises, and the household goods and chattels, and every part thereof respectively ;" and this description of his property runs throughout the will, a circumstance of considerable importance to be attended to in its construction. In the devise to the trustees, the word " rents" is particularly introduced. [Lord *Brougham*.—The word " rents" is there made applicable to leasehold as well as freehold.] The trust created in that part of the will is most general in its nature, and it is clear, that every possible property was intended to be accumulated for the benefit of this young man. The trustees have the power to sell every acre of the real estate and turn it into personalty ; and what is done with the personal estate, must be taken as giving the standard of construction for the whole will. In the devise to the trustees to pay the annuity to the testator's widow, rents are put upon the same footing as the other personal property. In the devise for the benefit of George Holland Ackers, the Wheelock estates and the sum of 7,000 *l.*, are in like manner treated as personalty, both being directed to sink into the residue should George Holland Ackers die before 21, and without lawful

(c) 3 Rep. 19.

(d) 14 East, 601.

(e) 5 Dow, 202 ; 1 Maule & Selw. 327.

(f) 2 Bing. 151 ; 2 Sim. & Stu. 505.

(g) 18 Ves. 368.

(h) 16 Ves. 491.

issue; and then follows the general provision as to the residue not bequeathed or disposed of. This provision shows, that it was the desire of the testator, that every possible part of the property should be capable of being made available for the increase of the accumulating fund. The annuity of 3,000*l.* to the testator's widow, is to come from the aggregate fund formed of the real and personal property, and "rents" are expressly spoken of as part of the fund to form that property. The very large allowance made to this young man at the University, is itself a test of what the testator intended, namely, that after providing for the annuities and legacies given by the will, this young man should succeed him in the possession of the property. Throughout the will, instead of keeping separate the real and personal property, they are constantly mixed together. There is nothing whatever from which it can be inferred, that the testator desired to give the benefit of this property to a third person, till the time at which the Appellant should obtain 24 years of age. It may be said, that the contrary is not apparent, and that the rule of law is, that an heir-at-law cannot be disinherited without direct words expressly and for that purpose. The words here are sufficiently express, for power is given to the trustees to do that which it is impossible they can do, if the claims of the heir-at-law are to be preserved. The trustees may sell the estate itself and convert it into personalty; and if they did so, it is clear that the produce of the sale would go to form part of the accumulating fund. The creation of this power is equal to a devise to the trustees of the intermediate rents and profits of the estate, for it gives them an absolute power over the capital of the estate

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itself. In *Gibson v. Lord Montfort* (i) there was a devise of real, leasehold, copyhold, and personal estate to trustees, their executors, &c., first for payment of annuities, &c., upon a deficiency of the personalty; and "as concerning all the rest, residue, &c.," in trust for the children of the testator's daughter, but if she die without issue then to B. and C., and the intermediate profits were held to pass by this devise; and it was further held, that trustees have a fee when the purposes of the trust cannot be answered otherwise. That case must govern the present. In that case, Lord Hardwicke considered and commented on the case of *Stephens v. Stephens* (j). In the latter case, the judges whose opinions were taken, concluded their certificate as to the point now in question, by stating, "As to the profits of the estate received since the death of the grandson, or to be received until it shall vest in any one person by force of the said executory devise, or shall go over to the remainder-man; we conceive that they belong to Sir Thomas Stephens, by virtue of the residuary devise in the will, as an interest in the testator's estate, not before bequeathed or disposed of." That case is as strong as any that can be put, for it is the case of an executory devise which may never be executed, but even in such a case it appears, that the intermediate accumulation of rents will go under the residuary devise. *Glanvill v. Glanvill* (k), is another authority to the same effect. There the testator, after making a provision for the maintenance of his children, gave "all the rest, residue, and remainder of his real and personal estate" to his son, T. W. G., "to be a vested interest on his

(i) 1 Ves. 485; Ambler, 93.

(j) Cas. temp. Talb. 228.

(k) 2 Mer. 38.

attaining the age of 21," and "if he shall happen to die before 21," then to a daughter, E. G., with remainders over. The Master of the Rolls (Sir W. Grant) held, that the rents and profits were to accumulate until T. W. G. attained the age of 21, or died under that age. In that case, there was no special clause of accumulation, but the whole matter was put upon the general rule as laid down in *Stephens v. Stephens*, and *Gibson v. Lord Montfort*. The same general rule was adopted in *Genery v. Fitzgerald* (l). Lord Eldon there stated most distinctly the rule on which the construction of devises of real and personal estate must proceed. He said, "When a testator mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention that the same rule shall operate on both? He does not by his will create any trust, but makes a legal devise and bequest of the whole together; then is not the weight of authority in favour of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together? I think it is." The only difficulty felt by the Vice-Chancellor in the present case was, in consequence of that part of the devise, by which on the property being conveyed to the infant, upon his attaining the age of 24, he is required to do certain things stated in the will. It was contended, that these things must be considered as conditions precedent to his right to enjoy the estate. In the report of the case in the Court below, *Phipps v. Williams* (m), the Vice-Chancellor appears to have said, "The mere attainment of the age, is not the only thing by which the testator marks the time at which it shall be determined whether the estate shall vest or finally

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(l) 1 Jac. 468.

(m) 5 Sim 44.

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become not liable to be divested, but there is a preliminary act to be done, without the doing of which James Ackers never would be entitled to call for the conveyance of the legal estate; for the testator has in express terms directed, that the conveyance shall be made on his giving such security, and executing such deeds as should be satisfactory to the trustees, for the purpose of securing the regular payment of the annuities. This is, in my opinion, clearly a condition precedent, and till that be performed, James Ackers will take no interest, and my opinion therefore is, inasmuch as there is no trust for the account of the rents, that the rents and profits of the residue of the real estate belong to the heir in the meantime. The consequence therefore is, that the demurrer of George Holland Ackers must be allowed, and the demurrer of James Ackers overruled." This case is properly divided into branches, the first relates to the estate James Ackers is to take at 24; the second, what is the effect of the general context of the will by way of raising an express gift? and it is clear that the judgment of the Vice-Chancellor was throughout directed only to the first of these two questions, and it is submitted, that for the reasons already stated, his Honor's judgment cannot be supported as to that point. Then as to the second point, it is clear on the face of this will, that the testator intended to leave all to this young man, and if the intention of the testator is to be, as it ought to be, taken as a guide in the construction of this will, the judgment of the Vice-Chancellor must be reversed, and the Appellant declared entitled to these rents and profits.

Mr. *Tinney* and Mr. *West*, for the Respondent:—  
As to the intention of the testator; if his intention was, what it is now contended to have been, the

only answer that can be made is, *quod voluit non dixit*. This appeal must be decided as one falling within the ordinary rule applicable to such cases. Where is the evidence of favourable intention on the part of the testator towards the Appellant? In every part of the will the testator has taken care to guard against making any acknowledgment of him. Then, as to the trusts, there is no trust declared as to the rents except for the repairs which the testator afterwards directs to be made out of the funds of the personal estate. [Lord Brougham :—Can you say that the heir is not disinherited when he is left at the mercy of the trustees, who have the power of converting the estate out and out?] The power here does not amount to a direction to convert the estate, and is not therefore a disinheriting of the heir-at-law. The accumulating clause entirely relates to the personal estate, and there is not one word in that clause affecting the real estate. In *Gibson v. Lord Montfort*, the testator himself had answered the question by the very form in which he manifested his intention in the will. Here there is no such express manifestation of the testator's will; and it is clear therefore that the intervening rents will not go with the real estate. The position adopted by Lord Eldon in *Genery v. Fitzgerald* (n) is not controverted. If the testator mixes up real and personal estates and makes a general devise of the residue, there is no doubt that both will go together. But that is not the case here, for he has in several parts of his will carefully distinguished between the two estates. *Genery v. Fitzgerald* is therefore, so far as it goes, an authority for the Respondent. In that case it was expressly declared, that if a testator gives a future estate to com-

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mence at a future period, the intermediate profits will not be carried, for he does not by his will create the trust. In like manner, when rightly considered, *Stephens v. Stephens* (o) is an authority in favour of the Respondent. In this will there is no residuary clause independent of this contingency, and, as there is no other clause in the will having the effect of disinheriting the heir-at-law, the ordinary rule of law must take place. Then the case of *Gibson v. Lord Montfort* is peculiar, containing, as it does, an exposition of the law different from any other case. But, first, it may be observed, that, in that case, there is a general mixture of rest, residue, and remainder, no such words being found in this case. To follow out the argument, an annuity, which is a portion of the real estate, as well as of the profits of the real estate, will go in remainder over. There is in *Gibson v. Lord Montfort* a distinct and clear ground on which the bequest of the residue must necessarily be taken to mean the residue of both real and personal estate. It is not so here. That case, however, is often carried farther than was intended by the judge who decided it; and the restriction which he puts upon the matter, by reference to what was the intention of the parties, is often overlooked. The case of *Glanvill v. Glanvill* (p) was not thoroughly argued, and the cases cited were inapplicable; the two first cases out of the three there cited relating only to realty, and the last turning entirely on the limitations in strict settlement. *Gibson v. Lord Montfort* is there cited as *Rogers v. Gibson*, under which name it is reported in Ambler (q). *Glanvill v. Glanvill* is to be supported on the ground that the gift there was a gift to the heir-at-

(o) Cas. temp. Talb. 228.

(p) 2 Mer. 38.

(q) Ambler, 93.

law on his attaining 21, and that that means that he is not to take till he attains 21. Now, apply that to the present case. Suppose James Ackers had died before he attained 24, where would the intermediate rents have gone? The other side must contend that they would have gone first into the general residue and next in remainder, and, if so, he must take a contingent not a vested remainder. If this residuary clause can carry the intermediate rents of James Ackers' estate, what can prevent it from carrying the intermediate rents of George Holland Ackers' estate? Yet even the other side will not pretend that it has any such effect, for that would show that James Ackers would take the rents of a vested estate, and would leave George Holland Ackers totally unprovided for. That is a consequence too monstrous to be adopted. It is said that this interest was a vested interest in James Ackers, and that so the intermediate rents passed to him. That argument is not supported by authorities. From the first to the last, all the cases cited, with the exception of *Stanley v. Stanley* (r), are cases of direct devises. In that case there is nothing to support the proposition contended for by the Appellant, except an observation of Sir W. Grant, then Master of the Rolls, who said that "the event on which the estate was given over would not determine the event on which it was vested;" but he held that the estate itself continued in the trustees till the party who was entitled to the vested estate for life attained 21. Leaving therefore *Stanley v. Stanley* as an indisputable authority, a case like the present, where there is merely a direction to convey, will not fall within its principle. There is no analogy be-

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tween the devises to G. H. Ackers and to the Appellant, for the estate of G. H. Ackers is a vested estate; but it cannot be said that the interest of the Appellant is vested when he is not allowed to take at 21, but is compelled to wait till 24, and then is not to have the estate except on performing certain conditions; on the refusal to perform which the trustees would continue to hold the estate till the object of making those conditions had been attained. It is clear that where a testator directs an act to be done before a party becomes entitled to an estate, unless that act is done the title of the party required to do it cannot have accrued. The Appellant here had no vested but only a contingent interest, and the intermediate rents and profits could not go to him in respect of such an interest. This point was elaborately argued in the case of *Duffield v. Duffield* (s), and the opinions of the judges taken and the case fully considered. In delivering the reasons of the judges, Lord Chief Justice Best said (t), "Until these estates become vested the estates themselves, and the rents and profits derived from them, pass to the heir-at-law of the testator as estates not disposed of by the will." That was the rule laid down, and to what estates did that rule apply? The sentence immediately preceding that which has just been quoted sufficiently answers the question: "The testator's freehold estates do not vest until some son of the testator's daughter shall attain the age of 21 years, and take the name of Elwes." The performance of that condition was considered alone to give a vested title to the estate, which till that condition was performed remained contingent. It may be

(s) 3 Bligh, N. S. 260. 1 Dow & Clark, 268 & 395.

(t) 1 Dow & Clark, 310; 3 Bligh, N. S. 330.

admitted that if the thing to be performed was directed to be performed by the trustees, it could not be said to be a condition precedent to the vesting of the estate, for then the trustees might for ever keep the party out of the estate by refusing to do the thing required; but that is not the case here, for the act of the party himself is that which determines the vesting of the estate, and there can be no hardship on him in preventing the estate from vesting until he does what the testator has required. If this is a condition precedent, then the estate is only a contingent estate, and the intermediate rents will not pass till the condition is performed. There was no conversion here out and out; and *Ackroyd v. Smithson* (*u*) shows that where that is the case, the legacies are not vested interests, but that, so far as they are constituted of personal estate, will go to the next of kin, and so far as they are constituted of real estate will pass to the heir-at-law. In that case, as in *Digby v. Legard* (*x*), a direction for the sale of the lands for payment of debts and legacies was held not to be a conversion out and out, and the residuary legatees in those cases having died, the Court held that the share coming out of the estate to such legatees was a resulting trust for the benefit of the heir-at-law. In *Doe v. Nowell* (*y*) it was decided that the word "if" was not in that will a contingent, but merely a descriptive word; but there it applied merely to the happening of an event, not to the doing of an act; and in all the cases the distinction is taken between a condition requiring a thing to be done and one requiring a time to arrive. In the former case the thing must be done before the estate vests: *Roun-*

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(*u*) 1 Brown, Chan. Cas. 503.(*x*) 3 P. Wms. 22, n.(*y*) 1 Maule & Selw. 327. S. C. nom. *Randoll v. Doe*, 5 Dow, 202.

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*del v. Currer* (z), *Johnson v. Castle* (a). There "a man had devised his term to his youngest son if he lived to the age of 25 years and did pay to his eldest brother so much money, and agreed no estate passed till the age of 25 years and payment of the money; and the reason was, that a devise executory may depend on a precedent condition." The same doctrine, after great consideration, was laid down in *Acherley v. Vernon* (b), where a rent-charge was devised to a person, payable half yearly, on condition that she should release all right and claim on the estate of the donor of the annuity. It was there declared that the release was a condition precedent, but that, even if it had been a condition subsequent, it ought to have been performed in a reasonable time; and the sister not having performed it in her lifetime, her husband was not allowed, after her death, to sue for the arrears of the annuity. *Doe v. Lea* (c) may be referred to as a case on the other side; but that is distinguishable, because there the only thing contended to be a condition was the arrival of a certain period of time, which has always been distinguished from a case where an act was to be done. In the case of *Duffield v. Duffield* (d), where the devise was to the son of the testator's daughter on his attaining 21 and changing his name to Elwes, this House held that no son of such daughter would be entitled to the freehold estates until the happening of both events, and that until that time the rents and profits belonged to the testator's heir-at-law. That case is the last great decision recognising the distinction between the happening of a period of time mentioned in a will, and the doing of an act required by

(z) 2 Bro. C. C. 67.

(a) Cited Winch, 116.

(b) Willea, 153.

(c) 3 Term Rep. 41.

(d) 1 Dow & Clark, 268.

such will to be done; and that case most completely established the doctrine, that where an act is to be done it must be done before the estate can vest. In this case, too, there is this important fact, that the testator has expressly provided a maintenance for James Ackers till he shall reach the age of 24, and that maintenance of 3,000 *l.* a year completely excludes the possibility of the testator intending that he should be entitled in the meantime to the intervening rents and profits. The case of *Gibson v. Montfort* is inconsistent with the subsequent case of *Bullock v. Stones* (*f*), and the authority of the latter must be preferred. In every respect, therefore, the decree was correct, and ought to be affirmed.

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Sir *Charles Wetherall* in reply.—The will clearly shows that the testator constituted the real and personal estate into one indivisible fund, for the use of the particular individuals who were to take in succession. The doctrine in *Genery v. Fitzgerald* (*g*), applies in such a case. That the real and personal estate were thus mixed together in one fund, is amply shown by the directions to the trustees as to the sale of the estate, and by the provision, that, should George Holland Ackers die before 21, the estate devised to him should “sink into and form part of the residuary estate.” If the estate is sold—and the trustees have the power to sell the whole of it, the money arising therefrom, or from the leasing, or from the exchange, is to go to form part of the residuary fund. There is no condition precedent here to prevent the Appellant from having a beneficial enjoyment of this estate. That part of the will is a direction, not a condition.

(*f*) 2 Ves. 521.

(*g*) 1 Jac. 468.

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Lord *Brougham*.—I think that the intention of the testator here was, to give the residue to J. Coops Ackers, but the question is, whether that intention is stated with sufficient clearness to enable the Court to carry it into execution? I am by no means satisfied with the judgment of the Court below, but I shall look into the cases before I decide upon it. A question similar to the present was raised in *Amphlett v. Park*, and Sir John Leach there doubted the authority of *Durour v. Motteux* (*h*), and intimated that, if it came before him in the House of Lords, he would examine into that decision. The ruling in *Amphlett v. Park* was submitted to. I wish it had come before me in the Court of Chancery on appeal, for then, in order to settle the question, I should have obtained the assistance of Lord Lyndhurst, the Master of the Rolls, and the Vice-Chancellor.

Judgment postponed.

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Lord *Brougham*.—James Ackers, being seised of real, leasehold and personal estates, made his last will, in which among other things, and after other devises and bequests, he devised certain leasehold premises and personal chattels to his wife for her life, directing that the interest therein unexpired at his decease, together with the personal chattels, should revert to and become vested in his executors, to be applicable to the purposes of the will, afterwards set forth, as to his personal estate; and he then gave and devised, by the most ample words, all his real and personal estate, whatsoever and wheresoever situated, to trustees (whom he also appointed executors and guardians of James Coops Ackers, the Appellant,) and their heirs and assigns for ever, “upon trust as to the real estate, to

(*h*) 1 Ves. 320.

keep it in repair, and to make sale, and absolutely dispose of, or let on reserved rents, or exchange for other lands, or partly for other lands and partly money, all or any part or parts of the said real estate," except a small parcel, the subject of the other appeal, and except the part devised to his wife for life, during his or her life; and the money got or rents reserved on such sale, lease or exchange was to fall into his personal estate. He then declares the trust as to the estate of Wheelock (the subject of the other appeal) to be, to G. H. Ackers, when he shall attain 21, together with 7,000 £., but in case of his decease before 21 without issue, both the one and the other are to become part of the real and personal estate, and to go according to the "disposition" (in the singular) after made; and as to the residue of the personal estate, not specifically disposed of, the trusts are, to repair the real as well as personal, meaning of course the leasehold, and to invest the surplus, and to accumulate it by way of compound interest, for James Coops Ackers (who appears to have been his natural son), "until he arrives at 24." In passing, I must say, that if anything turns on this, there is a great doubt whether G. H. Ackers took under the devise a vested or a contingent interest; if he had taken a vested interest, that would have made an end of the question, but then there are these words, "to pay over when he shall attain that age," and taking the two dispositions together, I have no doubt whatever, nor had his Honor, that that is a contingent devise. "Then upon trust to convey, assign and transfer, by proper and effectual conveyances and assurances, to James Coops Ackers, upon his giving such securities" (as if it were a condition precedent, which I do not think it is), "upon his giving such securities, and executing such deeds and

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assurances, to the satisfaction of the said parties or trustees for the time being, as their or his counsel shall advise, for the regular payment of the several annuities hereinbefore bequeathed, all the legal estate and interest of and in all my said freehold, copyhold and leasehold messuages, lands, tenements, rents and hereditaments, moieties, parts and shares of messuages, lands, tenements, rents and hereditaments, situate, standing, arising, lying and being in the United Kingdom of Great Britain and Ireland, and all other my real and personal estate and effects, whatsoever and wheresoever, not hereinbefore given, devised and bequeathed." Then after that parenthesis, on which every thing turns, "subject nevertheless to the life-estate of my said wife in my said capital messuage or dwelling-house, garden, land and premises, and the household goods and chattels thereto appertaining and belonging." Now this was not much, if at all, commented upon below, but it does appear to me to be not an immaterial feature here. You see, he first accumulates the personal rents, the profits of the personal estate, they are to accumulate with compound interest until James Coops Ackers attains 24, but he does not say, and then to be given to James Coops Ackers, but he before shows how the accumulations that he has just directed shall be disposed of, by giving them to James Coops Ackers (which is clearly his object), and he goes entirely off from that to the general residue of the real, as well as of the personal estate, and it is only under the general gift of the residue of the real and personal estate that he gives any directions whatever as to what is to be done as to the accumulations which he had immediately before directed to be made, a circumstance which is very material in my view of it, as to the blending of the two funds. The question decided in the Court

below, and now brought by appeal before your Lordships, is, whether or not this devise gives the intermediate rents and profits growing due, and of which perception has been had by the trustees previous to the period of majority—whether the devise gives them to James Coops Ackers, the Appellant? His Honor the Vice-Chancellor has decided that these rents go to the heir-at-law, as undevised; that it was a resulting trust for the heir-at-law, and that the gift to James Coops Ackers was contingent and not vested. I have already said, considering this to be clear that it was a contingent and not a vested interest in G. H. Ackers, that that raises the question whether it was meant to vest the intermediate rents and profits in James Coops Ackers. Upon the general principles which are to rule this case, there is no doubt; they are recognised in all the cases, and not disputed in any, even where the particular circumstances are understood to preclude their application; nor do I understand them to be here brought into controversy except, perhaps, in one part of the argument, upon the other appeal; indeed they are so clear, that they require no defence. The heir-at-law takes, through no intention of the testator, but paramount the will, and independent of it, or as it has been sometimes expressed, and not very correctly, against the will. This is indeed quite plain, it is only saying he takes as heir and not as purchaser. But from this it follows that he has no occasion at all for arguments upon construction, or to ascertain intentions in his favour. The arguments belong to the party who would displace him, and, by means of the intention expressed, defeat his claim; nor can he be so displaced and defeated, except by direct words or plain intention—an expression which I prefer to necessary intention. There must

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appear to be such an intention to exclude him, as to leave no reasonable doubt in the Court that it existed in the mind of the testator, and it will manifestly not be sufficient, that, from the general circumstances and situation of the party, or even from the general aspect of the instrument, we may have no moral doubt of how the framer of it could have answered the question had he been asked to declare his meaning, for this would let in every case of plain omission by mistake, and of gift by inept words, or in contravention of the rules of law. The words used in the will must be sufficient according to their legal sense, and within the rules of law to indicate the intention—there it is chiefly that the authorities aid, and indeed control us—for there have been authorities in this as in many other branches of the law respecting devises and bequests, which have given a certain weight to certain provisions; that is to say, the Courts have held these provisions as so strong to indicate intention, that a rule of construction with regard to them may be said to have been adopted, and when we find such provisions, we are not at liberty to say the intention did not exist, unless the other parts of the instrument are sufficient to rebut the inference.

Now it is impossible for me to look at the cases decided both at law and in equity without feeling that great force has been given to general bequests of all the residue, real and personal. The Court of Common Pleas, while it possessed such lawyers as Mr. Justice Wilson and Mr. Justice Heath, held such a gift to be strong enough to pass real estate, though accompanied with limitations utterly inapplicable to any but personal estate, *Doe v. Chapman* (i); and the

(i) 1 H. Bl. 223.

same was afterwards held in *Smith v. Coffin* (*k*); a doctrine extended many years afterwards in *Morgan v. Surnam* (*l*), (when Sir James Mansfield was in that Court,) to comprehend estates not in the contemplation of the testator. But this principle is general and will not carry us a great way. The view taken of a mixed residuary gift in *Gibson v. Montfort*, is of great importance. I have seen it commented upon by some very able text writers, as if Lord Hardwicke had there considered that a residuary gift of real estate by way of executory devise, and to a person not *in esse*, or to a person *in esse*, but to take only at a future time, carried the rents and profits of the estate during the intermediate time. That is certainly not the ground of the decision, which proceeds upon the whole circumstances of the case, on the devise being to the trustees in fee, and on the gift being the residue of all the estates, real and personal. But in one part of his elaborate judgment (*m*), he says, "It is pretty hard to say, that in any case where one devises all the rest and residue of his real estate"—now, mark that—"of his real estate, the heir should be enabled to claim anything out of it; for how can he claim or take these intermediate profits? He must claim them as part of the real estate undisposed of, not by any particular trust." It is clear he must claim them as heir, and therefore, *ex hypothesi*, all the real estate undisposed of, being in the residue given to *A. B.*, the heir cannot claim them. Lord Hardwicke afterwards dwells on the residuary devise of all estate personal as well as real. Let us, however, in passing, remark, although this is quite unnecessary in disposing of the present question, that it does seem

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(*k*) 2 H. Bl. 444.

(*m*) 1 Ves. 490.

(*l*) 1 Taunt. 289.

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difficult to understand a residuary devise, even when confined to real estate, in any other than this general and absolute sense. For what can it mean, but to give away from the heir whatever had not before been given away from him? In some of the cases discussion has arisen as to the words "not before given," or "not otherwise disposed of;" but these are implied in "rest, residue and remainder;" and besides, those words are here, for it is in that way the residue is given; the word "residue" is not here, but I think it stronger for not being here, for I think you find in all the cases it is said that "all other estate not otherwise disposed of," is clearly stronger than all residue. Then, suppose I give my estate of Blackacre to *A*, and then give to *B*. my other real estate not already or otherwise disposed of, "to be taken by him at 21," or "when he arrives at 21," surely this includes not merely the *corpus* of my estate at Whiteacre, but the intermediate rents of it, because they are parts of the real estate not otherwise disposed of. This clearly appears to have been Lord Hardwicke's opinion, and I know of no case in which it has been overruled, though it is said to be inconsistent with *Bullock v. Stones* (*n*), of which I shall presently speak.

But *Gibson v. Montfort* is certainly of peculiar authority. There is hardly any one of the same eminent person's judgments more laboured, and he felt strongly the difficulties of construing the will, for he begins by saying that it looked as if the testator had been minded to raise all the questions touching executory devises in trust which he could raise on such an instrument. The part, too, which occupies by far the greatest portion of the judgment is the one here

(*n*) 2 Ves. 521.

in question. Lord Hardwicke, at great length, shows that the trustees took a fee in the estates devised; and he then refers fully to the case of *Stephens v. Stephens*, and to the concurring opinion of the courts of law and equity, of himself sitting in the Court of King's Bench (for he was one of the judges who decided it), and of Lord Talbot and Lord King, that an executory devise of all the rest and residue of an estate, real and personal, takes in the intermediate profits of the real estates so devised upon contingency. He then states, that the only difference between *Stephens v. Stephens* and the case then before him was, that the devisee was *in esse*, which he agrees made it stronger. In the present case, too, the devisee was *in esse*. But he still holds that case of *Stephens v. Stephens* sufficient to decide the one in hand, though he adds, that it did not rest there, for the blending of real and personal estates in the same residuary clause, the surplus of the personal being on all hands admitted to pass, is a strong argument against a resulting trust to the heir-at-law, and that Lord King laid great strength on that circumstance in *Rogers v. Rogers* (o). He further relies on the disposal of the annuities, as furnishing new indications of the intention to exclude the heir. Some persons have been disposed to think that *Rogers v. Rogers* is the same case as *Stephens v. Stephens*, but it is not the same, and it does not appear to me to be the least like it, *Stephens v. Stephens* being a much stronger case than *Rogers v. Rogers*, and being one of the most celebrated cases in the Court of Chancery or Court of King's Bench. Lord Hardwicke also relies on the

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(o) 3 P. Wms. 193.

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disposal of the annuities as furnishing a new indication of the intention to exclude the heir. These, which were to be paid out of the real estate in case the personal estate proved deficient, were ordered to fall into the residue as the lives fell in. I have preferred a reference to the important cases of *Stephens v. Stephens* and *Rogers v. Rogers*, in the words, and with the remarks of such a commentator as Lord Hardwicke, rather than going at once to the books where those cases are reported. But taking them into view, and especially considering the decision of Lord Hardwicke in *Gibson v. Montfort*, I remain without any doubt at all upon the case at your Lordships' bar. But *Stephens v. Stephens* requires an observation further. The folio edition of Forrester's Cases temp. Lord Talbot, was published before 1750 (it was published in 1741), when *Gibson v. Montfort* was decided, and yet it is observable and remarkable that Lord Hardwicke there speaks of Lord Talbot's opinion as known to him only by rumour; he says, "I have *heard* that Lord Talbot approves of that case." But Lord Camden, in a case which I cannot recollect the name of, says, that Forrester's Reports are only written by Forrester down to page 228. It is a very odd circumstance that *Stephens v. Stephens* begins in page 228; so that that may account for Lord Hardwicke not taking the statement of Lord Talbot's approval on that authority. Lord Talbot (according to the Report in page 228) expressed his satisfaction with the certificate of the King's Bench, and said, he hoped it would, for the future, be a leading case in the determination of all questions of this kind. The main point, no doubt, in the case sent, and in the certificate returned, was, notwithstanding this, a

question then held not to be sufficiently decided. In *Taylor v. Biddal* (p) it is said, "if the intent be that the devisee shall take *in præsenti*, and there is no incapacity in him to do it, he shall not take *in futuro* by an executory devise." The devise there was to *A. B.* until her son should be of age, then to him in fee; he died within age, and yet it was held that a fee vested in him presently. In *Stephens v. Stephens* (q), an executory devise of an estate of inheritance to a person unborn, when he shall attain the age of 21 years, was held to be good, and the intermediate rents and profits were there declared to belong to Sir Thomas Stephens, by virtue of the residuary clause in the will, as an interest in the testator's estate not before bequeathed or disposed of. The first part of that decision was expressly founded on *Taylor v. Biddal*. But *Bullock v. Stones* (r) is cited as inconsistent with *Gibson v. Montfort*. I do not think there is any discrepancy between them whatever; indeed it is impossible there should be. Lord Hardwicke had decided the one only a few years before, and no person who had decided that case could have omitted the consideration of it in every other case coming before him on the same subject, as long as he lived. He appears to have laboured at it as much as any other case he ever decided. I shall first remark upon it, that some of the circumstances are wanting in *Bullock v. Stones* which occur in *Gibson v. Montfort*, and which occur here; next, reliance was there placed in the argument at the bar upon the relation in which the devisee, the unborn son of John Stones, the file-cutter, stood to his father. Thirdly, the judgment only gives the file-cutter (who was heir-at-law) the

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(p) 2 Mod. 289.

(q) Cas. temp. Talb. 228.

(r) 2 Ves. 521.

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rents and profits until the son comes *in esse*, and then gives them to the son ; at least this is the plain meaning of the judgment, though it is very inaccurately given, Lord Hardwicke being made to say, "I am of opinion that this intermediate interest or benefit arising to the heir-at-law, as to the profits of this estate, will determine upon his having a son, for that son's education is to come out of them ;" and he adds, "the son whom testator has instituted as heir," (using an expression in the civil law,) "shall have the benefit of these rents and profits from the time of his birth." Now this is his studious and firm opinion, but he goes on to add, "at least so far as his education and maintenance are concerned." What the surplus will be does not appear—probably nothing. This is rather an *ex cathedra* deciding, as to the intermediate rents and profits paying the maintenance and education, which is not disposing of that question.

The utmost then that can be said, as to the surplus untouched by the special direction respecting maintenance and education, is, that the judgment avoids disposing of it. But that which totally distinguishes the file-cutter's case from *Gibson v. Montfort*, and from the present case, is, that it is not the case of a general residue at all, it is only a gift of the "real and personal estate at Ashgate." By this must be intended the real estate at Ashgate and the personal estate there, or the personalty connected with the realty, and it looks as if it had been leasehold. Now no one maintains that a devise to A. when born, or when he attains 21, of the estate at Blackacre, will convey the intermediate rents. That is a known and admitted distinction between a devise of real and a gift of personal estate, to vest in possession or at a

future time. *Genery v. Fitzgerald* (s) was decided by Lord Eldon, upon an appeal from the Rolls, and he was so clear upon the point that he stopped the Respondent. *Bullock v. Stones* was cited by the present Vice-Chancellor, who argued it for the Appellant, as was *Gibson v. Montfort*. His Lordship, therefore, had the whole before him; and, after admitting the distinction between real and personal gifts in the same terms, and to the same purpose to which I have just adverted, he says, "When a testator mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention that the same rule shall operate on both;" that is, as to the intention to be gathered from the blending or the mixing; but I say, the residuary nature of the gift is, that which, in the judgment of Lord Hardwicke in *Gibson v. Montfort*, is the strongest reason for adopting such a conclusion. It must be further remarked, that this was a direct gift to the devisee, and not a fee limited first to trustees. Now Lord Hardwicke must have deemed that an important feature in *Gibson v. Montfort*, for a great part of his argument is employed in demonstrating that the trustees took a fee, and accordingly reliance was placed on the difference between the two cases by the Vice-Chancellor arguing on the Appellant's behalf in *Genery v. Fitzgerald*. Nevertheless, Lord Eldon was quite clear that the blending of realty and personalty in one clause was sufficient, and affirmed the judgment of the Master of the Rolls without hearing the other side, although the fee previously given to trustees, of which Lord Hardwicke thought so much in the former did not exist in that case.

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(s) 1 Jac. 468.



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The case before us has all the circumstances which occurred in *Gibson v. Montfort*, except that of the annuities directed to fall in, and it has other circumstances fully as strong as that was which did not occur in the former case. It is also distinguished by the circumstance admitted by Lord Hardwicke to have some weight, of the gift being to a person *in esse*. There is here, therefore, a devise to trustees in fee, not proved by implication, or made out by reasoning, but made in the most apt and express terms to convey a fee; and there is the power of sale, and exchange of all or any part of the real estate; the price to fall into the residue, and go from the heir—go from the heir, because the testator has given the residue. Now it is said that that is only a power given to the trustees and executors to dispose of by way of sale or exchange in such a way as to improve the real estate. Then what is the meaning of the word “whole?” if it had been “the sale of part,” or “to make sale of part,” that would have been intelligible; that would mean only such as would go to the improvement of the whole real estate, and that would not be a power of conversion out and out (as is the language of the Court on the subject) of the real estate; and then it might be argued as it was argued at the bar, that if it had been a conversion out and out under this clause, the Court of Chancery would have restrained them by injunction for a breach of trust. But what is the meaning of saying to improve the estate, not by the sale of part, but the whole? There is a power to sell the whole real estate; that is to annihilate the real estate, to convert it out and out into personalty. I do not understand how that can be restricted. It looks like a contemplation of selling if a good price could be got

for it, which I take it this manufacturer thought would be a good way of improving his real estate, and that the best mode of doing it would be to convert it into personalty. There is a clause respecting the repairs of the leasehold out of the general fund. There is the accumulation of the personalty and compound interest directed, and before any direction is added as to who shall take this, there comes the general gift of the real and personal estate not otherwise given, so that though no direction is given as to accumulating the income of the real estate, yet the accumulation of the personal income is only given under the same clause which gives the residue of the real estate. The word "disposition" is used in the singular, indicating clearly that it was all one provision or gift, real as well as personal.

There remains, then, no doubt whatever that this case is at least as strong as *Gibson v. Montfort*; perhaps stronger; that it is stronger than *Genery v. Fitzgerald*; that it does not at all come within the principle of *Bullock v. Stones*, and that, therefore, we are justified in deciding that the circumstances indicate plainly an intention to displace the heir-at-law with respect to the intermediate rents and profits.

I do not at all consider the doctrine as recognised in *Stephens v. Stephens*, *Gibson v. Montfort*, and *Genery v. Fitzgerald*, as an arbitrary one, or proceeding on technical grounds. The main circumstance of the residuary gift of real and personal naturally and in itself indicates, and, strongly too, an intention that both should follow the same course, and be dealt with in the same way. But I am also of opinion, that the gift of a real residue, without blending it with a personal residue, would of itself have the same effect upon another ground, namely, the

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meaning of residue ; still more, if as here the words, " not otherwise disposed of," are found in the gift; for this shows that the devisee, under such a gift, is to take all the real estate, not otherwise given ; and this must exclude the heir who cannot as such take under any gift. Such, too, is Lord Hardwicke's opinion in *Gibson v. Montfort*, although he does not decide the case upon this ground alone. As for *Wright v. Horn* (t), which is sometimes referred to in cases of this kind, and which, as well as *Goodright v. Opie* (u), is relied on in the argument at the bar in *Gibson v. Montfort*, it clearly has no application, for it related entirely to a lapsed devise of land which is now admitted not to pass under such residuary gift. The residuary gift is that which the present case has in common with the three others I have cited. But the other circumstances of the case (I mean the other provisions of the will) are strong to indicate the same intention of excluding the heir-at-law.

I observe that reliance was placed below upon the parenthetical words, " upon his giving such security, &c." And his Honor is represented to have treated these as in the nature of a condition precedent. To be sure, if it were so, that would make a great difference in the argument, but I can on no account allow that there is anything like a condition precedent, or, indeed, a condition subsequent either, to be found in these words ; but it is a direction and provision wholly nugatory and useless, inasmuch as the law would have required the performance of the same thing wholly unconnected with the devisee taking under the gifts, or his manner of taking. The common direction to give a receipt might as well be called a condition precedent.

(t) 8 Mod. 221.

(u) Id. 123.

I am, therefore, of opinion, that in this case the gift to James Coops Ackers, though it was not vested; yet was a gift that displaces the heir, for the reasons which I have given, in respect chiefly to the residuary gift of real and personal estate, but in respect also, as strengthening that inference, to the intention of displacing the heir-at-law in favour of the devisee, and which intention, I think, is clearly made out from the other circumstances of the case. I shall, therefore, move that in this case the decree of the Court below be reversed, and that the costs shall come out of the estate.

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The following was the order entered in the Journals: "ORDERED and ADJUDGED that the order complained of in the said appeal be, and the same is hereby reversed, and that the demurrer be allowed; without prejudice to the equities of the several parties to this suit in the suit and appeal of *Phipps v. Ackers*(a), now depending in this House. And it is further ordered, that the costs of all parties, both in the Court below and of the appeal, be paid by the Appellant, James Ackers, out of the estate."—Lords' Journ. 67, p. 651.

(a) See next case.

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## APPEAL

FROM THE COURT OF CHANCERY.

SOPHIA PHIPPS, Widow - - - - - *Appellant.*GEORGE HOLLAND ACKERS - - - - - *Respondent.*

*Will.  
Construction.  
Executory  
Devise.*

A testator devised and bequeathed all his real and personal estate to trustees, in trust, as to his lands in W., to convey them to G. H. A. when and so soon as he should attain his age of 21 years; and also to pay him 7,000 £. upon his attaining that age; but in case he should die under 21, without leaving issue of his body, then the lands in W. given and devised to him, together with the 7,000 £, should sink into the residue of the testator's real and personal estate, and go over. G. H. A. attained his age of 21 ten years after the testator's death. Did G. H. A. take a vested interest in the lands in W. on the testator's death, or was it contingent until he attained 21? And did the rents and profits arising from these lands in the meantime belong to him or to the testator's heir-at-law?—(See the next preceding case.)

*Practice.*

Where the subjects of two appeals are so connected that the case of a party to one of them is affected by the arguments in the other, to which he is not a party, his counsel will be allowed to answer those arguments.

MRS. PHIPPS, the Respondent in the preceding case, and heir-at-law of the testator therein mentioned, appealed against the Vice-chancellor's decretal order, allowing George Holland Ackers' demurrer to her Bill (a). This appeal, as well as that of *Ackers v.*

(a) *Vide supra*, p. 673, and 5 Sim. 61.

*Phipps*, having abated by Mrs. Phipps' death before the hearing, they were both revived by an order of the House, in the names of her executors and devisees.

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The arguments on the devise to James Ackers in the preceding case, being admitted to apply generally to the devise to the Respondent in this appeal, it was agreed, on the suggestion of Lord Brougham, that only one counsel on a side should be heard, and that the counsel for James Ackers might attend to watch his interests.

Mr. *Preston* for the Appellants:—The first proposition is, that the devise of the testator's real and personal estates to his trustees (*b*), and the direction to them, as to the Wheelock estate, to stand seised thereof, in trust, to convey the same to G. H. Ackers, *when and so soon as he should attain his age of 21*, has not the constituent qualities of a gift to him of the rents and profits of that estate from the testator's death till he attained the age of 21. Every devise of real estate, that will pass the intermediate rents, must vest *instantly* in the devisee; otherwise those rents result to the heir-at-law, or fall into the residue of the real estate, and they would pass under a general residuary clause; as for instance, if a testator give all his real estates to his daughter's son A., at his age of 21, and if A. die under 21, to every other son of his daughter at the age of 21, that is a good executory devise of the real estate; and then if he give all the residue of his real and personal estate to another, the intermediate rents, until the devisee of the real estate

(*b*) *Vide supra*, p. 668.

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attain 21, will pass with the residue. *Stephens v. Stephens (c)*; *Gibson v. Lord Montfort (d)*.

The second proposition is, that the residuary clause in this will, taken in its largest sense, does not carry the intermediate rents of the real estate to James Ackers—

Mr. Knight :—James Ackers, to whom the residue of the estates real and personal is devised, does not claim the rents of the Wheelock estate.

Lord Brougham :—Mr. Knight, if I find my opinion of your client's case affected by Mr. Preston's argument, I will apprise you of it at the close.

Mr. Preston :—The argument for the Appellants must be carried to the length that the residuary clause in this will did not pass the intermediate rents of *any* of the real estates; and if this House should decide that it did, on the authority of such cases as *Genery v. Fitzgerald, (e)*, that decision will operate against the Appellants in this case. The judgment of Lord Eldon in *Genery v. Fitzgerald*, was pronounced without that learned judge's usual caution, and it was not supported by the previous cases. There was no doubt that a gift of personal estate to A. at 21, would carry the intermediate profits; but Lord Eldon held, that when a testator mixed up real and personal estate in the same clause, he thereby showed an intention that the same rule should operate on both estates. His lordship's error was in applying a rule of construction instead of a rule of

(c) Cas. Temp. Talb. 229-233.

(d) 1 Ves. sen. 485.

(e) Jacob, 468.

law. The distinction between real and personal estate was truly laid down in the case of *Forth v. Chapman* (*f*), which has never been shaken, except for a short time by *Porter v. Bradley* (*g*), after which the law was brought back as it stood before. There was no such general rule as that alluded to by Lord Eldon in *Genery v. Fitzgerald*, namely, that by mixing two funds, realty and personalty, you are to apply to both the law which is applicable to one only of the funds. In the file-cutter's case, *Bullock v. Stones* (*h*), the heir-at-law was held entitled to the intermediate rents of the devised estates. The devise there was, of all the testator's real and personal estate, in trust, that the first son of J. Stones, (the file-cutter,) when he came to 21, should have all the real and personal estate, and his heirs male for ever; with a direction for his maintenance and education. J. Stones had no son at the date of the will or at the testator's death. Lord Hardwicke held, that the profits of the personal estate were to accumulate, and as to the real estate, that the devise of it was a good executory devise, but that all the rents and profits descended to the heir, until a son was born to J. Stones, when they, or as much as might be necessary, should be applied to his maintenance and education; that the legal estate was in the trustees and the gift to J. Stones was contingent. Lord Hardwicke, in his judgment, said, "Where there is an executory devise, whether of a legal estate or of a trust estate in this Court, the rents and profits go to the heir-at-law, because the legal estate in the one case or trust in the other descends in the meantime to the heir-at-law." So

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(*f*) 1 P. Wms. 663.

(*g*) 3 T. Rep. 143.

(*h*) 2 Ves. sen. 521, and Bell's Supplement, 419.



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again in the case of *Gibson v. Lord Montfort* (i), Lord Hardwicke, approving of the decision in *Stephens v. Stephens*, said, "in a Court of Law, it had been determined that where there is an executory devise in a will, all the rest and residue of an estate real and personal would also take in the intermediate profits of the real estate so devised in contingency, which would otherwise go to the heir-at-law."

Lord Brougham:—The case of *Bullock v. Stone* was cited to Lord Eldon in *Genery v. Fitzgerald*, and was more relied on than the case of *Gibson v. Lord Montfort*.

Mr. Preston:—The attention of Lord Eldon was not called to the question of the rents and profits; it is a misfortune that Lord Eldon did not hear counsel on both sides, and did not take time to consider the case, instead of deciding it off hand. His judgment must sooner or later be reviewed by this House, with the assistance of the judges of the courts of law, and till then it cannot be received as law. The true principles of construction, with the history of the cases from which they are derived, are stated by Chief Justice Willes in the case of *Doe d. Morris v. Underdown* (j), where it is said that a residuary devise of real estate will not pass any benefit by reason of lapse, as such benefit belongs to the heir at law: *Wright v. Horne* (k), *Goodright v. Opie* (l), *Bagwell v. Dry* (m). A general devise of real estate, being a contingent devise, will not carry any immediate beneficial interest: *Duffield v. Duffield* (n). In that

(i) 1 Ves. sen. 485-491.

(j) Willes, 293-297.

(k) 8 Mod. 222.

(l) Id. 123.

(m) 1 P. Wms. 700.

(n) 3 Bli. N. S. 260. S. C.  
 1 Dow. & C. 395.

case, which was a well-considered and a most important case, this House established the opinion of the judges, that the rents and profits of the estates there devised belonged to the heir-at-law of the testator, until the estates became vested in the devisee by his attaining 21.

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The third proposition was, that if the residuary clause (*o*) could be held to pass the intermediate rents of the Wheelock estate, James Coops Ackers, the residuary devisee, could not take them until he attained 24. It was impossible in arguing this case not to deal with his interests; for the inquiry was whether the testator in dealing with the objects of his bounty, intended to give them the intermediate profits of the estates respectively devised to them—whether they took a present vested right to receive the rents and profits. If ever there was a will in which contingency was the object of the testator, it was this; from the whole context of the devises, it was apparent he was contemplating contingency. If, therefore, the interests of the devisees were contingent, then the heir-at-law was entitled to the rents and profits until the respective periods of vesting arrived. It is admitted that G. H. Ackers was not to have the interest of the 7,000 *l.*; what reason was there for implying that he was to take the rents of the freehold estate? The legacy produced no fruit to him, nor the freehold either. Could he ask for a conveyance before the age of 21? There was no gift to him but in the conveyance, and the conveyance was to be made on a contingency, which failing, there could not be a conveyance to him. If the interest of G. H. Ackers be contingent, the interest of James Ackers must be so *à*

(*o*) *Vide supra*, p. 669.

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*fortiori*, as he was not to take a conveyance until he attained 24, and gave the trustees satisfactory securities for due payment of the annuities and legacies given by the testator, which last condition would of itself make his interest contingent: *Chambers v. Brailsford* (p).

After citing and observing upon a great number of cases, most of which are referred to in the preceding appeal, and adopting, occasionally, the arguments urged in that appeal, on behalf of the heir-at-law, he submitted with confidence, that the devise of the Wheelock estate, in trust to convey and assign the same unto G. H. Ackers, as soon as he should attain his age of 21 years, was future and executory, and did not vest until he attained 21, and that the beneficial interest of the rents and profits of that estate were in the meantime undisposed of by the will, and therefore fell, by way of resulting trust, to the heir-at-law, and consequently belonged to the Appellants as his representatives.

Mr. *Lynch* for George Holland Ackers:—Whatever should be the decision of the House in the case of James Ackers, to which Mr. Preston chiefly directed his arguments, it could not affect the interest of this Respondent. The devise of the Wheelock estate to him was clear and concise, and might well stand by itself. The words of it were quite sufficient to carry all the estate which the trustees took under the general devise, and which unquestionably included the intermediate rents “as, to, for and concerning all my messuages, lands, and premises, situate at Wheelock,” &c. He read the devise of the Wheelock estate as

set forth, p. 668 *supra*, and insisted that by virtue thereof G. H. Ackers took a vested interest in that estate from the moment of the testator's death, and became entitled to the conveyance and possession of the estate itself on attaining his age of 21. If then he took a vested interest in the estate, he was entitled to the rents and profits as a necessary consequence, unless they were given away from him by the will. But there were no words in any part of the will disposing of those rents. By the residuary clause, the testator gave to James Ackers all the legal estate and interest of and in all his freehold and all other his real and personal estate and effects *not before given and devised*. But the Wheelock estate was before specifically devised to G. H. Ackers. The scheme of the will was this: The testator first gave the legal estate in all his real estates to trustees, with power to sell them, except the Wheelock estate, which he directed the trustees to stand seised of in trust to convey, assign, and assure the same to G. H. Ackers, when he should attain 21; but if he should die before that age, without leaving lawful issue of his body, that estate was to sink into the residue of the real estate. The question then was, whether G. H. Ackers took an immediate vested interest in the estate so devised to him. It was clear, that if he died before the age of 21, leaving issue lawfully begotten, the estate could not go over from the issue. The intention of the testator was, that G. H. Ackers should have possession of the estate at 21, and the rents and profits and a vested interest in the meantime. According to the argument for the Appellants, if G. H. Ackers died before 21, leaving children, they would take the estate before the father, had he lived, could have it. When an estate is given in possession or

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reversion on a contingency, and is devised over in case the event do not happen, the devisee takes a vested interest before the event, liable to be divested if he died before it, and then the estate goes over: *Boraston's case* (q), *Edwards v. Hammond* (r); *Goodtitle v. Whitby* (s); *Doe v. Lea* (t); *Bromfield v. Crowder* (u). These were cases of devises in remainder, after estates in possession. *Doe v. Lea* was an express decision in favour of a vesting before the time of taking in possession. In *Edwards v. Hammond*, it could not be held that the person there, being only of the age of 15, could recover in ejectment, except on the principle that the estate was vested. In *Doe d. Hunt v. Moore* (x), which was a case of real estate in fee when the devisee should attain 21, and in case he died before 21, then over, Lord Ellenborough giving the judgment of the Court held, upon the authority of *Bromfield v. Crowder*, and *Goodtitle v. Whitby*, that the devisee took an immediate vested interest, liable to be divested upon his dying before he attained 21. And the same doctrine was held in *Doe v. Nowell* (y), which, as well as *Bromfield v. Crowder*, was affirmed in this House. There was no substantial difference between a devise to the use of G. H. Ackers and a direction to the trustees to convey to him, and one part of the case of *Stanley v. Stanley* (z) is a direct authority on that point. The cases of *Bullock v. Stones*, *Duffield v. Duffield*, and *Chambers v. Brailsford*, which were urged as authorities for the claim of the heir-at-law by Mr. Preston, were all very different in

(q) 3 Co. 19.

(r) 1 N. Rep. 324.

(s) 1 Burr. 228.

(t) 3 T. Rep. 41.

(u) 1 N. Rep. 313.

(x) 14 East, 601.

(y) 1 Maule & S. 327, and 5 Dow, 202.

(z) 16 Ves. 491.

their circumstances from this case. On the other hand, the recent case of *Warter v. Hutchinson* (a), bringing down the acknowledgment of *Boraston's* case, and the numerous cases of that class, was quite decisive in favour of the Respondent.

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It was argued on behalf of the Appellants, that as no interest was given to the Respondent in the 7,000*l.*, in which he certainly took a vested interest on the death of the testator, it was therefore to be inferred that he had no right to the rents of the real estate. But it should not be forgotten that the law as affecting devises of real estate and personal estate was quite different. These were distinct devises. The Respondent's right to the rents of the real estate, up to the time of taking a conveyance of that estate, was really strengthened by the consideration that interest on the legacy of 7,000*l.* was not given to him; there was otherwise no provision for his maintenance and education during his minority, as in the case of *James Ackers*; and it was also of importance to consider that no power was given to the trustees to sell or exchange the *Wheelock* estate. The true construction of the whole will was, that the Respondent took an immediate vested interest in the estate in *Wheelock*, liable to be divested in the events mentioned in the will. Words seeming to import contingency in devises of this nature have been uniformly held to give a present vested estate, subject to be divested in order to effectuate the presumed intention of the testator. Besides, in this case, the estate was not given over, except in default of issue of the Respondent; in order to enable such issue to inherit, the Respondent must take a vested interest, and as the Respondent takes a

(a) 1 Barn. & C. 721.

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vested interest he must be entitled to the rents and profits as incident to his ownership.

Lord *Brougham* asked if the counsel in attendance for James Ackers had any observations to make in reply to Mr. Preston's application of the case of *Bullock v. Stones*, and the distinction taken between that case and *Genery v. Fitzgerald*. His Lordship, for his own part, thought these cases were reconcilable.

Sir *C. Wetherell* and Mr. *Knight*, who had argued for James Ackers in the former appeal, distinguished this case from *Bullock v. Stones*. The gift there was to a person unborn; it was not a gift of residue. They maintained the decision of Lord Eldon in *Genery v. Fitzgerald*, justified as it was by previous cases. The doctrine there laid down should not be again questioned, nor should doubts be opened on settled cases. They agreed in and adopted Mr. Lynch's arguments upon the vesting of the rents before the devisee became entitled to the possession of the estate; and upon that point, and on the effect of the residuary clause, they referred to Lord Eldon's judgment in the case of *Duffield v. Duffield*.

Mr. *Preston*, in his general reply, relied on that judgment, and insisted that it was entitled to the first consideration. *Duffield v. Duffield* was a later case than *Genery v. Fitzgerald*, which he held to be inconsistent with principle as well as with the authorities.

Lord *Brougham*:—This is a case of great importance. As the case of *Ackers v. Phipps* was unavoidably subject to be affected by the argument for the Appellants in this, the attendance of Sir Charles

Wetherell and Mr. Knight was proper, for the purpose of answering so much of Mr. Preston's argument as might bear against the interest of James Coops Ackers. I shall take time to look into the authorities referred to, particularly *Bullock v. Stones* and *Genery v. Fitzgerald*, which last case Lord Eldon decided at once, without much argument, and which it has long been the opinion of Mr. Preston is not law.

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I shall give my best attention to both cases; it is not likely that I shall delay them for a hearing before the common law judges, which could not possibly be had before February next. I have grave doubts on the Vice-Chancellor's decision appealed from in *Ackers v. Phipps*, but my opinion leans towards his in respect of the gift to George Holland Ackers. Let both cases stand over for decision together.

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Lord *Brougham* this day, after delivering judgment in the preceding case, proceeded thus:—Now we come to *Phipps v. Ackers*, the other appeal, in which the Vice-Chancellor decided in favour of the devisee. I had in this case less doubt than on the last, but that arose from my not having fully examined the structure of the clause, and from my attention having been very much drawn away from the argument to some matters which do not now appear to me to bear very mainly on the case. I think that the decree in the devisee's favour cannot here be supported, at least upon the same ground with the reversal of the other decree. The main feature is here wanting of a residuary gift; the only reference to residue is in the gift over, on the decease of George Holland Ackers under the age of 21, and without issue. In that event the estate of Wheelock, and the 7,000*l.* money given to him on his attaining the age of 21, are

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directed to sink into the residue of real and personal estate, and go according to the disposition thereof subsequently expressed. But this direction must be taken to mean that the real estate shall be united with the real residue, and the personal estate with the personal residue, and that the whole shall go to the residuary devisee. Now if a question were raised whether, on the event having happened of George Holland Ackers having died under 21, and without issue, the heir-at-law, or the devisee of the residue, James Coops Ackers, took the intermediate rents and profits of Wheelock, as he would the profits of the 7,000*l.*, this disposition of the Wheelock estate might, with the residuary gift to James Coops Ackers, show that they went to him. But as they can never be shown to go to him, if George Holland Ackers lives till 21, the event not having happened on which alone he is entitled, so it seems clear that those intermediate rents never can go to George Holland Ackers, because there is wanting the residuary gift to George Holland Ackers, which is the main ground of deciding against the heir-at-law in the other case, and there is no other circumstance whatever to supply its place and indicate the intention of displacing the heir. It becomes then the mere case of a gift of Wheelock to George Holland Ackers on his attaining the age of 21, which assuredly does not convey the rents intermediately received, nor can the addition of the legacy of the 7,000*l.* in the same clause alter the matter. In short, all the argument proceeding from the force of the word "residue," or of the words "other estates not disposed of" in the gift to James Coops Ackers, fails here, and the cases cited do not apply, except the case of *Bullock v. Stones* (b), which clearly does, and

(b) 2 Ves. sen. 521.

so does what Lord Eldon says in *Genery v. Fitzgerald* (c).

While, therefore, I am of opinion that the decree in the first case, in favour of the heir-at-law, must be reversed, I think that the decree against her in this case must, if it is to be allowed to stand at all, be rested on another ground, namely, that of the interest given to George Holland Ackers being an immediate vested interest and not a contingent interest, that is, an estate which would vest *instantly*, liable to be afterwards divested on the event happening of the decease of George Holland Ackers under 21. In favour of this view there are the cases of *Doe d. Hunt v. Moore* (d), perhaps also *Bromfield v. Crowder* (e), and against it *Chambers v. Brailsford* (f). As to *Doe v. Moore*, I wish to speak with the greatest possible respect of that case, but I am not the only member of the profession who has considered the language of Lord Ellenborough, in giving the judgment of the Court in *Doe v. Moore*, as being very strong indeed, and going a very great way, and being very difficult to be reconciled with the other cases as to the use of the word "when," and similar words. Here it is "when and so soon as," which I think makes some difference, but would rather make it to appear to sound more like contingency than the word "when" alone. There is that case at the Rolls, *Graham v. Hanson* (g), in which Sir William Grant gravely and learnedly argues from the civil law that "when" and "if" are equivalent words as referred to legacies. It is true as to what Lord Ellenborough says, that it may be so with respect to personal estate. But nevertheless

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(c) 1 Jac. 468.

(f) 18 Ves. 368.

(d) 14 East, 601.

(g) 6 Ves. 239.

(e) 1 New Rep. 313.

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I am not satisfied that he has made out that the civil law principles support that most sweeping assertion, which would really make the case of *Doe v. Moore* amount to this, that a devise of Blackacre to A. when he attains 21, without any gift over,—though there was a gift over, to support which gift over the tendency of the Courts is to make it vested and not contingent,—that that devise to A. at 21 or 24 is a vested interest. It is quite impossible to say that *Bromfield v. Crowder* supports that position; you will find that that case does not go so far. I therefore consider that this case, to say the least of it, is encumbered with very considerable doubt; and I also consider that *Bromfield v. Crowder* is with the utmost difficulty reconcileable with the decision pronounced by the Court below, as I am sure it is irreconcilable with the language which the Court of King's Bench used in the case of *Doe v. Moore*. My opinion is, that *Phipps v. Ackers* cannot stand on the same ground on which *Ackers v. Phipps* is reversed, namely, the effect of the residuary clause, and of the circumstances indicating an intention to displace the heir, unless that main circumstance of displacing the heir is allowed to exist in this case, namely, the gift of an estate vested, only postponing the enjoyment, I mean only postponing the possession, and liable to be divested; in short, a vested defeasible estate, liable to be defeated when the event happens. If it is such a vested estate, undoubtedly the decree is supported; if it is a contingent estate, as that of James Coops Ackers was, it cannot stand on the ground on which the decision is now given in favour of James Coops Ackers.

Now this being the case, the course which I would advise your Lordships to take, is to postpone the fur-

ther consideration of this appeal. My Lords, it is very painful for me to find that the case on which I entertain no doubt, is one of a large sum of money, as large a sum as 40,000 *l.*, but the other is a question of so much smaller value, that I am afraid, if your Lordships were to order a second argument, and to have the judges to assist your Lordships in disposing of it, the misfortune would be that from the smallness of the stake, the expense would have to come out of an estate which is not very able to bear it, and there is no means of enabling it to be charged on the larger fund, because that belongs to James Coops Ackers. I wish to throw out these suggestions in the presence of the parties in the case of *Phipps v. Ackers* (in the other case there is no doubt), and to ask them, in the first place, whether it be true or not, that this estate is so trifling.

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(It appeared from the answers of the agent for the Respondent, that the rents and profits of the estate devised to him, varied from 300 *l.* to 500 *l.* a year, from the testator's death in 1823 to the year 1833, when the Respondent attained his age of 21.)

Lord *Brougham* :—Then taking the annual income at 400 *l.*, the fund is about 4,000 *l.* Then there is the value of the estate.

Mr. *Lynch* :—In such a case as this, as the difficulty is created by the will, I should submit that the general fund should bear the expense.

Lord *Brougham* :—That is the question : who is here to represent the fund ?

Mr. *J. Russell*, of counsel for James Ackers, said there was a suit for the administration, in which that question might be raised, altogether distinct from this

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suit, which was a bill filed by the heir-at-law, claiming adversely to the will. In the appeal in which Mr. Lynch appeared, there was no party who represented the estate at all.

Lord *Brougham* :—Then there is nobody before us in this case, who represents the fund ; but that does not prevent us from doing justice.

Mr. *West*, of counsel for the Respondent in *Ackers v. Phipps*, asked what his Lordship said as to the costs ?

Lord *Brougham* :—All costs in *Ackers v. Phipps* to come out of the estate—I never gave a decision with so much pain ; it is the hardest case I ever knew.

Adjourned for further consideration *sine die*.

The judgment has never been applied for, the parties having, it is understood, entered into an arrangement.

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## A P P E A L

FROM THE COURT OF SESSION.

JAMES JOHN FRASER, W. S. - - - - *Appellant*.

JOHN GORDON, Esq. - - - - - *Respondent*.

*Practice.* On the day appointed for hearing an appeal, when its competency also was first to be argued by one counsel at a side, pursuant to an order of the House, the Respondent's counsel appeared at the bar, and, no counsel or agent appearing for the Appellant, prayed that the appeal be dismissed. The House required him to open a *prima facie* case against the appeal before they would dismiss it.

THE Appellant was a writer to the signet in the city of Edinburgh, and was for some time agent for

the Respondent, Lieutenant-colonel Gordon, of Cluny, in Scotland, and had large pecuniary transactions with him. In consequence of some differences between them, they raised actions against each other in Scotland; and from two interlocutors pronounced in those actions, one by the Lord Ordinary, on the 15th of November 1834, the other by the Second Division of the Court of Session, on the 15th of January 1835, Mr. Fraser appealed. The appeal was twice dismissed for irregularity and non-compliance with the orders of the House, before it was ripe for hearing. On presenting the third appeal, Fraser appeared before the Appeal Committee, to whom the Respondent's petition, suggesting the incompetency of the appeal, and praying for its dismissal, had been referred, and he so far sustained his case that the committee recommended the appeal to be set down for hearing, and that its competency be argued at the bar by one counsel on each side, which the House ordered accordingly, and appointed a day for the hearing.

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Dr. *Lushington* appeared as counsel for the Respondent when the appeal was called, and said he was ready to support the interlocutors complained of; but observing that no counsel appeared for the Appellant, he concluded that the appeal was abandoned; and he asked their Lordships to dismiss the appeal with costs, and affirm the interlocutors as of course.

The Appellant did not appear, nor did any counsel or agent appear for him.

Lord *Devon* said the Appeal Committee had been of opinion, when this case was before them, that the appeal could not be sustained, but the Appellant was very anxious for a hearing, and alleged that he should

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be able to make out a clear case at the bar for reversing the orders of the Court below. The appeal was, therefore, on the report of the Appeal Committee set down for hearing for this day, and the Appellant had notice.

Lord *Brougham* said, even on the supposition that the Appeal was abandoned, still it was necessary for their Lordships to hear the Respondent's case opened on the merits, so that they might see that the orders complained of were well founded. As the House had to pronounce a judgment, it became requisite to hear some reasons for it<sup>(a)</sup>.

Dr. *Lushington* then proceeded to state the Respondent's case.

Lord *Brougham* stopped him after a short time, saying the House was satisfied that a *prima facie* case was made; it was proper for their Lordships to hear so much of the case stated at the bar. His Lordship then moved that the appeal be dismissed with costs, and the interlocutors complained of be affirmed.\*

Ordered accordingly.

(a) But see *Gardiner v. Simmons*, ante 1 Clark & F. 35; *Ricketts v. Lewis*, 2 Clark & F. 100, and *Hamilton v. Littlejohn*, post vol. iv. See also *Mellish v. Richardson*, 1 Clark & F. 224.

\* The Appellant within a few days after the date of this order presented a petition for a re-hearing, which was referred to the Appeal Committee, but not complied with, whereupon he lodged another appeal, which has not been heard.

## A P P E A L

FROM THE COURT OF CHANCERY.

JOHN BUSH and ANN his Wife, and Ro- }  
 BERT MATTOCK - - - - - } *Appellants.*

SUSANNAH LOCKE, Widow - - - - - *Respondent.*

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Robert Marke being seised to him, his heirs and assigns, according to the custom of the manor of *Taunton Deane*, of certain messuages within that manor, surrendered the same to trustees, in pursuance of articles of agreement made in in contemplation of marriage, on trust, to permit him, his heirs and assigns, to enjoy the premises until the marriage, and from the solemnization thereof on trust for himself for life, and after his decease on trust for the intended wife for life, for her support and in bar of dower, and after the death of the survivor of the husband and wife, on trust to surrender the premises into the hands of the lord of the manor, to the use of the child or children of the marriage, their heirs and assigns, such surrenders to be made at the costs of the children, who should be entitled to take the same, and in default of issue of the marriage living at the death of the survivor of the husband and wife, then on this special trust, to surrender the premises into the hands of the lord of the manor, to the use of the right heirs of the settlor for ever, according to the custom of the manor; such surrender or surrenders last-mentioned to be made at the costs and charges in all things of the person or persons who by virtue of the last-mentioned condition or limitation should be entitled to take the same. The only issue of the marriage was a daughter, who survived the settlor, but died in the lifetime of her mother. On the daughter's attaining 21, the premises were surrendered to the lord of the manor, to her use, and she by her will devised them to the sons of her mother by a second husband, and at the same time surrendered them to

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 Limitation to  
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the use of her will; her mother surviving her continued in possession of the premises till her own death.

**Held**, by the Lords, affirming decrees of the Court below in a suit between a purchaser for valuable consideration from the devisees, and the settlor's youngest sister and customary heiress at his widow's death, that by virtue of the ultimate limitation in the articles she was entitled to the customary estates from the death of the widow. (See the note at the end of the case.)

**ROBERT MARKE**, by articles bearing date the 24th of April 1769, reciting that a marriage was soon to be solemnized between him and Grace Haddon, spinster, and that he was then lawfully seised to him and his heirs and assigns for ever, according to the custom of the manor of *Taunton Deane*, in the county of Somerset, of certain messuages, lands, tenements, and premises therein particularly described, (all which messuages, &c. were situate in the parishes of Pitminster and Corffe, and were parcel of the customary lands of inheritance of *Taunton Deane*,) in consideration of the said intended marriage, and of the portion of the said Grace Haddon, and for settling and assuring the said messuages, &c. covenanted and agreed with John Haddon and John Marke, as trustees, that he, Robert Marke, would, before the solemnization of the said marriage, well and sufficiently convey and assure to the use of the said trustees, their heirs and assigns for ever, according to the custom of the said manor, all the said messuages, &c. to be held by them, and the survivor of them, and the heirs and assigns of such survivor, upon trust to permit him, Robert Marke, to enjoy the same, and receive the rents thereof until the marriage, and from and after the solemnization thereof, upon trust to permit him and his assigns to enjoy the said several messuages,

&c., and receive the rents thereof to his or their own use, for his life; and upon further trust, after his decease, to permit the said Grace Haddon, and her assigns, to enjoy the said messuages, &c., and receive the rents thereof to her and their use, for the term of her life, for her better support, and in full recompense of dower and thirds which she might otherwise claim out of the freehold lands, or hereditaments of the said Robert Marke; and upon this further trust, that after the death of the survivor of them, the said Robert and Grace, the trustees, &c. should surrender into the hands of the lord of the manor, for the time being, the several messuages, to the use of such children of the marriage, for such estates, and in such manner and form as the said Robert, or, in his default, the said Grace, should by deed or will appoint; and in default of appointment, then, upon trust, to surrender the said messuages, &c. to the use of all and every the child or children of the said marriage, ther heirs and assigns for ever, according to the custom of the manor aforesaid, as tenants in common; and if but one such child, then to the use of such child, his or her heirs and assigns for ever, according to the custom of the said manor; such surrenders to be made at the costs and charges of such child or children, who should be entitled to take the same; *and in default of issue of the said Robert on the body of the said Grace, that should be living at the death of the survivor of them, then upon this special trust and confidence, that the trustees should surrender into the hands of the lord of the manor aforesaid, for the time being, all and singular the said several messuages, &c. to the use and behoof of the right heirs of the said Robert Marke for ever, according to the custom of the said manor, such surrender or surrenders*

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*last mentioned to be made at the costs and charges in all things of such person or persons who, by virtue of the last mentioned condition or limitation, should be entitled to take the same."*

On the 26th of April 1769, surrenders were made of the several messuages, in consideration of the intended marriage, and in pursuance of the articles, to the use of the trustees, who were thereupon admitted by the lord as tenants of the customary messuages, &c. therein comprised. The marriage was solemnized soon afterwards, and there was issue thereof, one child only, *Elizabeth Marke*. Robert Marke died in 1779, intestate as to these customary premises, leaving Grace, his widow, and Elizabeth, his daughter, and only child, him surviving. The widow afterwards, and in the lifetime of her said daughter, intermarried with James Turner, and died in 1819, leaving the said James Turner, her second husband, and two sons of that marriage, John Haddon Turner, and James Turner the younger, surviving her. She had enjoyed the said premises until her death.

On the 15th of April 1803, the then trustee duly surrendered the said messuages, &c. into the hands of the lord, to the use of the said Elizabeth Marke, her heirs and assigns for ever, according to the custom of the said manor; and she, on the 16th of February 1812, surrendered into the hands of the lord all her messuages, &c. whatsoever within the said manor, to the use of John Haddon Turner, her brother of the half blood, his heirs and assigns for ever, to be holden upon condition to perform her will. And by her will of the same date she devised all her customary lands and hereditaments in the parish of Corffe to her other half brother, James Turner; and all her other customary messuages, lands, and hereditaments to the

said John Haddon Turner, his heirs and assigns, according to the custom of the said manor. Upon her death in April 1812, without having been married, John Haddon Turner was admitted tenant of the messuages comprised in the said marriage articles.

In 1820 and 1824 respectively, Thomas Southwood, with notice of the said articles, purchased parcels of the said messuages, &c. for valuable consideration, from John Haddon Turner and James Turner the younger, with the privity of James Turner their father, and the same were duly surrendered to the use of Thomas Southwood, his heirs and assigns.

In May 1825, the Respondent filed her bill against T. Southwood, stating, among other things, that Robert Marke had no issue save the said Elizabeth, and that he left no brother surviving, and that the Respondent was his youngest sister, and as such sister she became and was, at the time of the death of Grace Marke, and was then the heiress of the said Robert Marke, according to the custom of the said manor; and as such customary heiress, upon the death of Grace Marke, she became and was entitled to the customary premises under and by virtue of the trusts of the said articles of agreement, and further stating the surrender thereof to the use of T. Southwood, and that he was at the time of such surrender, and still was lord of the manor, and that the legal estate of and in the said premises, by virtue of such surrender, vested in him. And after charging, amongst other things, that according to the true construction of the said articles the said premises were, upon the death of the survivor of Robert and Grace Marke, without leaving issue of their marriage then living, to be surrendered to the use of the person who should then be the customary heir of Robert Marke, the

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bill prayed that it might be declared, that the Respondent was entitled in equity to the said customary premises, and that T. Southwood might be decreed to surrender the same to her, and her heirs and assigns, and to admit her to the same, and that an account might be taken of the rents and profits since the death of the said Grace Marke, &c.

Thomas Southwood, by his answer, admitted that the Respondent as such youngest sister became, and was at the time of the death of Grace Marke, heiress (a) of the said Robert Marke according to the custom of the said manor; but that also by the custom, the widow of a tenant dying seised of customary lands, parcel of the said manor, is his heir of such lands, to her and her heirs absolutely, and that Grace Marke was therefore, at the time of the death of Robert Marke, his heir according to the custom of the said manor, and he therefore denied that the Respondent, as such customary heiress as in the bill alleged, did, upon the death of Grace Marke, become, or was

(a) The Appellants alleged that this admission was a mistake, and in their case before this House they set forth the custom thus:

“By the custom of the manor of Taunton Deane, if a tenant dies having a wife at the time of his death, then his widow is his heir, and as such becomes absolutely entitled to all such customary estates of her said husband as shall be undisposed of by his will, *to hold to her and her heirs for ever*, according to the custom of the said manor; and if such widow marries again, her second husband is entitled to be admitted tenant to her customary estates, and thereupon becomes absolutely entitled thereto. If a tenant dies having no wife at the time of his death, then his youngest or only son is his heir according to the custom of the said manor; and in case of no son, his youngest or only daughter is his heir according to the custom; and in case of no son or daughter, then his youngest or only brother is his heir according to the custom; and in case of no brother, then his youngest sister is his heir according to the custom of the said manor.”

then entitled to the said customary premises. And he admitted that the legal estate in the said premises that had been purchased by him, was then vested in him, and that he was lord of the said manor. And he submitted that he was not a trustee of the legal estate of the said premises upon the trusts of the said articles; and that, according to the true construction of them, the said premises were not upon the death of the survivor of Robert Marke and Grace his wife, without leaving issue of their marriage then living, to be surrendered to the person who should be the customary heir of the said Robert Marke, as in the bill alleged.

The cause came on to be heard before the Vice-Chancellor, on the 30th of June 1829, when his Honor decreed for the Respondent in the terms of the prayer of her bill.

Thomas Southwood presented a petition of appeal to the Lord Chancellor, but died before his appeal came to be heard, having by his will devised to the Appellant, Ann Bush, part of the hereditaments in question in the cause, and all the rest of his manors, &c., comprising the remaining part of the hereditaments in question to the Appellant, Robert Mattock. Against these devisees the Respondent filed her bill of revivor and supplement, and the suit was accordingly revived. The appeal and supplemental cause were heard by the Lord Chancellor, on the 20th of June 1831, when his Lordship affirmed the Vice-Chancellor's decree (*b*).

From these decrees John Bush, and the said Ann his wife, and Robert Mattock appealed to this House. The appeal being considered to involve difficult questions of law, an order was made, on the petition of the

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(*b*) See Report, *Locke v. Southwood*, 1 Myl. & C. 411.

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Appellants, for the attendance of the common law Judges; but the order was afterwards discharged, and the case was heard without the Judges.

Sir *William Horne* and Mr. *Preston* for the Appellants:—The ultimate limitation in the marriage articles, in default of issue of the body of Robert Marke, the settlor, on the body of Grace Haddon, living at the death of the survivor of them, to the use and behoof of the right heirs of the said Robert Marke for ever, according to the custom of the manor, was a reservation of the old estate of the settlor, and revested the estate in him, subject to the previous limitations, and upon his death the same descended to and vested in his widow, as his heir according to the custom of the manor, and not, as contended for on the part of the Respondent, a limitation by purchase to an unknown and uncertain person, who by chance might happen to answer the character of customary heir at the death of the survivor of the settlor and his wife. *Thrustout* dem. *Gower v. Cunningham* (c), *Doe v. Frost* (d).

By the custom of this manor of *Taunton Deane*, upon the death of an owner of copyhold land within the manor, leaving a widow, she is his heir, and is absolutely entitled to all his customary lands not disposed of by his will. If that be the custom, then the decree appealed from was wrong, as having declared against the right of the Appellants whose testator derived under the widow's title, having purchased the lands from her sons after her death, with the concurrence of her husband, their father. But supposing that the widow was not the heir of the settlor, then

(c) 2 Black. 1046.

(d) 3 Barn. &amp; Ald. 546.

the only other person who could be his heir according to the custom, was his daughter and only child, who, after attaining her full age, and after a surrender was made of the copyhold lands to her use, devised them to her brothers of the half blood, and directed a surrender of them to the use of her will. From these devisees Mr. Southwood made his purchase and took a surrender of the lands. So that whether the widow or the daughter of the settlor was his heir, in either case the decree was erroneous. The case on behalf of the Respondent was, that neither the widow or daughter was the *persona designata* in the ultimate limitation in the marriage articles, because the daughter dying before the widow could not answer the description in that limitation, and the widow had only a life interest and could not be heir to herself. But the case of *Holloway v. Holloway* (c) was a direct authority to the contrary. Now, as the question, who was the right heir of the settlor, turned upon the custom of the manor, the House would, if there was any doubt on that point, direct an issue, to ascertain the fact, before their Lordships gave any judgment on the case.

The manifest object and intention of the marriage articles was confined to the making a provision for the wife of the settlor and the children of the marriage; the articles were, according to an express recital contained in them, made in consideration of the marriage, and of the marriage portion of Grace Haddon, the intended wife. If Robert Marke had survived his wife and daughter, he would have been entitled to have called on the trustees to re-surrender the customary premises to him, the sole objects and purposes

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of the trusts having been spent and gone. It never could have been the intention of the settlor to settle his own estate, so that even if his wife died the day after the marriage, his interest therein should be reduced to a life estate merely, in favour of a person uncertain and undefinable during his life, and from whom no consideration, either directly or indirectly, moved to the settlor and owner of the fee. A provision for any person or object unconnected with the marriage is negatived by the first trust in the articles, viz., the trust to permit Robert Marke, his heirs and assigns, to hold and enjoy the premises until the marriage; while it is contended on the part of the Respondent, that this case is an exception to the general rule of construction in such cases, inasmuch as the trustees are, by the terms of the trust, required to do an act after the happening of the contingency, viz., to surrender the trust estate; but it is submitted that this expression is mere form, part of the *cantilena* of the trusts, and did not exclude the right of the settlor to his old reversion as a reversion.

But supposing that this view of the case is wrong, and that the right heirs of the settlor are to take by purchase, and that the ultimate limitation is not to be considered a reservation of the old use, the Appellants submit, that the contingency, upon which the same was to take effect, ceased on the death of Elizabeth Marke, the only issue of the marriage, in 1812; and that upon such event the ultimate limitation vested in Grace Turner, the widow, and heir of the testator according to the custom of the said manor. The custom of the manor, which constitutes the youngest sister heir according to the custom, applies only to a descent taking place at the death of the owner; and at that time the Respondent was not heir, or customary

heir of the owner in this case, a title adverse to that claimed by the Respondent having, by the surrender to Elizabeth Marke in 1803, existed for near twenty-one years, at the time the Appellants' testator purchased the estate in question, and he having so purchased for a valuable and full consideration, the Respondent was barred of all title to relief in equity.

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Sir *Edward Sugden* and Mr. *Jacob* for the Respondent:—The estate in question remained subject to the trusts of the articles of agreement of the 24th of April 1769, and by the ultimate limitation of those articles, it was, upon the death of the survivor of Robert Marke, and Grace his wife, without leaving issue of the marriage then living, to be surrendered to the person who should then be the customary heir of Robert Marke; and the Respondent was at that time his customary heir, *Goring v. Nash* (f), *Ellison v. Ellison* (g). It was quite true that a limitation to one's right heirs is, in the abstract meaning, a reservation of the old estate; but the question in this case was not of the old use, but of a new transfer of the estate. The cases of *Holloway v. Holloway* and *Doe v. Frost*, were not applicable to this case; but *Long v. Blackall* (h), was a strong authority for the Respondent, who was clearly the person destined by the ultimate limitation in the articles to take as heir according to the custom of the manor.

The legal estate was, by reason of the surrender before the marriage, vested in the trustees, to continue in them during the life of the survivor of the husband and wife, after which it was to be transferred to the person who should be then entitled to take

(f) 3 Atk. 186.

(g) 6 Ves. 656.

(h) 3 Ves. jun. 486.

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under the designation in the articles. The legal estate was out of the settlor, nothing was reserved to him but the rents and profits during his life. This was a limitation to take effect by substitution. In the case of *Thrustout v. Cunningham* the settlor reserved to himself the legal estate for his life. The rule in Shelley's case could not be applied to two estates,—one legal, the other equitable—which could not coalesce. The settlor here had only the equitable interest. The settlement was very peculiar; the children of the marriage were not to have a vested interest at 21, or marriage, as was usual in settlements, nor until after the death of the survivor of the father and mother, so that any disposition, by a child of the marriage, of this estate, while the father or mother was living, could have no effect whatever. To the case of *Holloway v. Holloway*, as far as it was applicable here, the cases of *Jones v. Colbeck* (i), and *Müller v. Eaton* (k), were sufficient answers.

The most absurd consequences would follow from the supposition that this estate was, under the limitation in the articles, to revest in the right heirs of the settlor at his death; for instance, the settlor's wife would be his right heir according to the custom of the manor, as admitted by the Appellants; she was to have the estate for her life under the articles, and, according to the argument for the Appellants, she would, by her death, come into possession of the fee simple.

This being a third hearing of this case, it was hoped that the decrees below would be affirmed with costs.

Sir *William Horne* replied:—The estate was never out of Robert Marke. Being seised to him and his

(i) 8 Ves. 38.

(k) Coop. Chan. Cas. 272.

heirs, and being about to marry, he by his marriage settlement limited the estate to himself for life, remainder to his wife for life, &c. So far then the estate was never divested, but remained in the settlor as of his old reversion, or was a resulting trust to him after the trusts of the settlement were exhausted. It could not make any difference how much of the estate was exhausted by the intermediate limitations if the whole was not so exhausted; whatever of it remained reverted to the settlor as of his old estate.

The case was not much argued in the Court below.

The *Lord Chancellor* said, that he had a perfect recollection of the case, and of his view of it when it was before him (*l*), and that he had before him a note of the argument before the Vice-Chancellor, who appeared to have had his attention called to all the bearings of the case. He recollected also that he had an hour's conversation with his Honor on the subject, and his Honor appeared to have inclined against his own argument in *Doe v. Frost*.

Lord *Wynford* :—I am free to state to your Lordships that I have not formed any decided opinion on the case. Whether, on a fuller consideration of the cases referred to, and on a more deliberate perusal of the articles of settlement, I shall be able to make up my mind, or I may think it necessary to have another argument before the Judges, I am not prepared to say; all I ask now of your Lordships is, to postpone the further consideration of the case.

The *Lord Chancellor* :—I agree with my noble and learned friend in postponing the consideration of the

(*l*) It has been only lately reported, 1 Myl. & C. 411.

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case, but it ought to be remembered that if we shall require to have another argument before the learned Judges, we cannot dispose of the case this session, as the Judges are gone or preparing to go their circuits. The case was thoroughly argued in the Court below; at least before me, and I certainly retain the opinion which I then held.

The case was adjourned for further consideration.

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March 9.

The Appellants presented a petition for a rehearing before the Judges; that petition was referred to the Appeal Committee, but not complied with.

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Lord *Brougham* :—When this case was last before the House, a doubt was suggested whether it ought not be heard again by your Lordships, with the assistance of the Judges of the common law Courts. It appears to me, from what passed in the Court of Chancery when the case was there on appeal before myself, and also from what passed here on the hearing last session, that it really was not a case requiring the presence of the learned Judges. There was no doubt that the case involved matter of equity, and that it was by no means a pure question of law. The case was very fully argued in the Court of Chancery, and it was then agreed by the counsel on both sides, according to my recollection, and according to a note of the argument which I have since looked into, that it was not a fit case to be sent to a court of law. If it was not deemed to be a fit case for a court of law, your Lordships will not probably think it a case in which judgment ought to be delayed for the opinion of the Judges. The case appeared to me, even if it were

heard on the point of law said to be involved in it, not to admit of any reasonable doubt. I have carefully considered the case. I considered it at the time of the argument, and I concurred in advising your Lordships to postpone your judgment in consequence of the doubt then entertained by my noble and learned friend Lord Wynford. It has stood over a whole session, and it is hardly fair to the parties interested in the judgment to put it off longer. From the state of health of my noble and learned friend, it is all but certain that he cannot attend here during this session, and it is very doubtful, for the same reason, whether he will be able to attend next session. Under these circumstances, and having no doubt on my own mind of the correctness of the decision appealed from, I think I should not discharge my duty if I did not now advise your Lordships to affirm that decision; but I do not advise your Lordships to give the Respondent any costs, because my noble and learned friend expressed a doubt whether it was not a case fit for the opinion of the Judges.

Ordered accordingly, that the judgment complained of be affirmed, without costs (*m*).

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(*m*) See *Locke v. Colman*, 1 Myl. & C. 423, which was another suit by the Respondent to recover other parts of the copyhold lands comprised in the articles of agreement above-mentioned from purchasers thereof for valuable consideration. In that case an issue was directed to try who was Robert Marke's customary heir. The result was, as the reporters have been informed, that the Respondent was found not to be such heir.

# I N D E X.

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**ADEMPITION.** See DEVISE, 2.

**APPEAL.** See PRACTICE, 6.

A client having required his attorney's bills of costs to be taxed, the attorney intimated to him that in that case he would make out new accounts, in which he would charge his full legal fees, which were not charged to that extent in the bills delivered, and accordingly he employed a person to remodel the accounts, and that person inserted in the new accounts fictitious charges, and increased other charges which were in the former accounts. The attorney denied all knowledge of the insertion of the fictitious charges, and abandoned them before the auditor to whom the accounts were by order of Court remitted to be taxed. The Court by a subsequent order instructed the auditor to report specially on the different subjects and points raised by the client's answers, imputing to the attorney a participation in the fabrication of the fictitious charges. These charges having been abandoned, the auditor made no inquiry into them, but reported on the other costs, taxing off about one-fourth of the whole bill, and no objection being lodged to that report when it came before the Court, it was confirmed with costs.—Held, that it was not competent for the client to appeal to the House of Lords against the order confirming the report, as he had not lodged objections in writing to it in the Court below.—*M'Aulay v. Adam*, 385.

**AWARD.**

1. It is no objection to an award that the arbitrators have, in the absence of one of the parties, called in the other, and have asked him whether he admitted or disputed certain items in an account, and have merely taken his answer to that question.

Under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and pro-

perty of a partnership, it is no objection to their award that they have availed themselves of the assistance of such person in deciding on the partnership accounts. The arbitrators, by adopting in terms the opinions of such person, do not constitute him an umpire, but make his opinions their own, and their award cannot be impeached on that account.—*Anderson v. Wallace*, 26.

2. By Act of Parliament, authorising a joint-stock company to raise 80,000 *l.* in shares of 25 *l.* each, the directors were empowered to make such calls for money on the subscribers to the undertaking as they should from time to time find necessary for the purpose of carrying on the same, but no such call should exceed 10 *l.* per cent., and one month at least should intervene between the calls. The directors brought an action against one of the subscribers for the amount of two calls made on his shares, on the same day, and that subscriber brought a counter action against the directors for the value of his shares as at a certain period, on the ground that they had, without his consent, engaged in speculations foreign to the company's undertaking, and at last abandoned that undertaking and united themselves with another Company. Both actions were referred to an arbitrator under an order of Court; and he found that the directors were entitled to a decree for the amount of the two calls, with interest; and that the subscriber was entitled to a decree for a certain sum as the ascertained price of his shares, which sum, under deduction of that awarded for the calls, he was entitled to recover from the company on surrendering or transferring his shares to them, or to any person they might direct; and he further found that the directors were entitled to reservation of any claim they might have against the subscriber for calls made subsequent to their action, and that the subscriber was entitled to reservation of his defences against such claims.—Held by the House of Lords that the award was bad, inasmuch as the first finding for the amount of two calls made in one day was contrary to the statute, which required the distance of a month at least between two calls, and the second finding was not final and conclusive, as it held the subscriber entitled to recover the sum awarded to him upon condition only of transferring his shares.  
*Semble*, the third finding, reserving subsequent claims of one



party and defences of the other thereto, was not bad (though unnecessary), inasmuch as a reference of "all questions between the parties," by the practice in Scotland, is confined to the questions in the particular actions referred.—*Baillie, Bart. v. The Edinburgh Gas Light Company*, 639.

#### **BANKRUPTCY.**

*W.* lent money on the security of an estate, which he believed, on the representation of the borrower, to contain 95 acres, and to be ample security for the sum lent. The borrower, after paying the interest of the loan for four years, became bankrupt, and the trustee on his sequestrated estate discovered that the description of the lands charged in security to *W.* did not comprise more than six acres. *W.* being advised of the objection to his security, applied to the bankrupt, and obtained from him a corroborative and supplemental bond, reciting the former deed, and subjecting the whole 95 acres, as originally intended, to secure the loan, and *W.* obtained infeoffment on this latter security before the trustee in the sequestration completed his feudal title.—Held, by the Lords, affirming the interlocutor of the Court of Session, that the supplemental bond was void as against the trustee.—*Inglis v. Mansfield*, p. 362.

**BOND.** See **BANKRUPTCY**, 1.

#### **CONTRACT IN WRITING.**

Evidence to affect it. See **EVIDENCE**, 1.

#### **COPYHOLD.**

Customary tenant. See **DEVISE**.

#### **CORPORATION.** See **AWARD**, 2.

Certain local Acts of Parliament gave the Corporation of the city of Dublin the power to take measures for supplying that city with water, and to levy rates and rents on the inhabitants to meet the expenses that might thereby be incurred. The corporation passed bye-laws appropriating part of the revenue thus raised in a manner not strictly falling within the provisions of these Acts. Some of the inhabitants of Dublin filed a Bill against the corporation for an account, and the Court of Chancery in Ireland decreed an account, and held the corporation answerable for all sums which it had received and appropriated in a way not strictly conformable with the provisions of the local Acts.—The House on appeal affirmed this decree.

—*Dublin (Corporation of) v. The Attorney General of Ireland*, p. 289.

**COSTS.** See PRACTICE, 6.

On appeal and cross appeal, the former being allowed and the latter dismissed, the Lords, holding that the Appellant in the appeal ought, as the representative of the mortgagees, in a suit originally instituted to redeem the mortgages, to have had the final decree with costs in the Court below, gave him costs in the cross appeal by way of compensation.—*Morgan v. Evans*, p. 159.

**DEBTS, PRIORITY OF.** See PRIORITY.

**DEVISE.** See FOREIGN LAW, 1. MARRIAGE SETTLEMENT, 1, 2.

1. Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase contrary to their ordinary sense; or unless in the other provisions of the will there should be a clearly expressed intention inconsistent with the giving of an estate tail, and which intention can only be fulfilled by sacrificing the particular provision, and regarding the expressions as words of purchase.—Held accordingly, that under a devise to "*W. F. and his heirs male, according to their seniority and their respectively attaining 21, the elder son surviving of the said W. F. and the heirs male of his body to be preferred to the second or younger son, and in case of failure of issue male of W. F. surviving him, or dying without lawful issue male attaining 21,*" then over, an estate tail was devised to *W. F.*—*Fetherston v. Fetherston*, p. 67.
2. *W. L.* bequeathed 5,000 *l.* to the daughter of his brother *J. L.* charged on his real estates, and authorized the interest thereon to be raised for her maintenance, if *J. L.* should so direct; and he devised his real estates so charged to *J. L.* in fee. *J. L.* bequeathed 10,000 *l.* in trust for his daughter for life, and after her death, in trust for her children, and declared that that sum should be in addition to the sum to which she was entitled under *W. L.*'s will. The daughter afterwards married. Her father advanced to her husband 15,000 *l.* as her marriage portion, and, by the settlement, pin-money and a jointure for the wife, and portions for the younger children of the marriage, were provided out of the husband's property, and the 15,000 *l.* were declared to be

in satisfaction of the sums to which the wife was entitled under *W. L.*'s will. The father died in 1794, and no demand was made for the 10,000 *l.* until 1826.—Held by the Lords (reversing the decrees of the Vice-Chancellor and Lord Chancellor), that the 10,000 *l.* legacy was satisfied by the marriage portion; assuming, as one ground of their judgment, that the daughter was apprised of the contents of her father's will soon after his death.—*Durham (Lord) v. Wharton*, p. 146.

3. A testator devised all his freehold, copyhold, and leasehold messuages, lands, tenements, rents, and hereditaments, and all other his real and personal estate, whatsoever and wheresoever, not before disposed of, to trustees, with power to sell and absolutely dispose of, or to exchange or let, all or any part or parts of his said estate, upon trust, as to a certain part, to convey and assure that part to his godson, *G. H. A.*, when and so soon as his godson should attain 21; and also to pay to *G. H. A.* 7,000 *l.* upon his attaining 21. But in case *G. H. A.* should die without issue before attaining 21, then the said part of the real estate, together with the 7,000 *l.*, was to sink into and become part of the residue, and to go according to the disposition thereof, thereafter in the will expressed. As to the rest, residue, and remainder of his personal estate, he directed it to accumulate at compound interest until *J. C. A.* should attain 24 years, then upon trust to convey, assign, &c. unto *J. C. A.* (upon his giving such security, and executing such deeds for the payment of annuities before bequeathed to other persons, as should be to the satisfaction of the trustees) all the legal estate and interest of and in all the freehold, leasehold, and copyhold lands, tenements, rents, and hereditaments, and all other the testator's real and personal estate, whatsoever and wheresoever, not thereinbefore devised and bequeathed.—Held, that this gift to *J. C. A.* displaced the heir as to the residuary gift of real and personal estate; that he took a vested interest in the intermediate rents and profits, and that the words respecting his executing deeds and assurances did not constitute a condition precedent.—*Achers v. Phipps*, p. 665.
4. A testator devised and bequeathed all his real and personal estate to trustees, in trust, as to his lands in *W.*, to convey them to *G. H. A.* when and so soon as he should attain his

age of 21 years; and also to pay him 7,000 *l.* upon his attaining that age; but in case he should die under 21, without leaving issue of his body, then the lands in *W.* given and devised to him, together with the 7,000 *l.*, should sink into the residue of the testator's real and personal estate, and go over. *G. H. A.* attained his age of 21 ten years after the testator's death. Did *G. H. A.* take a vested interest in the lands in *W.* on the testator's death, or was it contingent until he attained 21? And did the rents and profits arising from these lands in the meantime belong to him or to the testator's heir-at-law?—*Phipps v. Ackers*, p. 702.

5. *Robert Marke* being seised to him, his heirs and assigns, according to the custom of the manor of Taunton Deane, of certain messuages within that manor, surrendered the same to trustees, in pursuance of articles of agreement made in contemplation of marriage, on trust, to permit him, his heirs and assigns, to enjoy the premises until the marriage, and from the solemnization thereof on trust for himself for life, and after his decease on trust for the intended wife for life, for her support and in bar of dower, and after the death of the survivor of the husband and wife, on trust to surrender the premises into the hands of the lord of the manor, to the use of the child or children of the marriage, their heirs and assigns, such surrenders to be made at the costs of the children, who should be entitled to take the same, and in default of issue of the marriage living at the death of the survivor of the husband and wife, then on this special trust, to surrender the premises into the hands of the lord of the manor, to the use of the right heirs of the settlor for ever, according to the custom of the manor; such surrender or surrenders last-mentioned to be made at the costs and charges in all things of the person or persons who by virtue of the last-mentioned condition or limitation should be entitled to take the same. The only issue of the marriage was a daughter, who survived the settlor, but died in the lifetime of her mother. On the daughter's attaining 21, the premises were surrendered to the lord of the manor, to her use, and she by her will devised them to the sons of her mother by a second husband, and at the same time surrendered them to the use of her will; her mother surviving her continued in possession of the premises till her own death.

Held, by the Lords, affirming decrees of the Court below in a suit between a purchaser for valuable consideration from the devisees, and the settlor's youngest sister and customary heiress at his widow's death, that by virtue of the ultimate limitation in the articles she was entitled to the customary estates from the death of the widow.—*Bush v. Locke*, p. 721.

**EQUITY.** *See* LIMITATIONS, STATUTE OF.

An expectant heir, under pecuniary pressure, mortgaged his reversionary estate, and entered into other obligations to secure payment of goods, purchased at the shop prices, with the intention of selling or otherwise disposing of them, for the purpose of obtaining money to supply his immediate wants; his father, the tenant for life of the estate so mortgaged, was privy to the transaction, and did not dissent; the expectant heir, on receiving the goods, so dealt with them that they could not be restored to the mortgagee.—Held, by the Lords, affirming the decree of the Court below, that such heir had no equity to have the transaction rescinded, or to be relieved against the securities.—*King v. Hamlet*, p. 218.

Though the Court of Chancery cannot review or correct a decision of the Court of Exchequer, yet where such decision has been obtained collusively and fraudulently, a party whose interests are affected by it, may raise, in the Court of Chancery, either as actor or defender, a question as to its validity.—*Bandon (Earl) v. Becker*, p. 479.

Where sales of estates had fraudulently taken place under decrees of the Court of Exchequer in Ireland, obtained by collusion between the tenant for life, the mortgagee, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been protected in such suits, the Court of Chancery in Ireland, on his coming into possession, granted him relief on a bill filed to redeem. That decree was affirmed by the Lords.—*Id. Ib.*

**EVIDENCE.** *See* POOR.

1. King gave Kemp an undertaking in writing, in these words: "Mr. Kemp, when the title to the Philpot-lane estate is perfected, and the same shall be regularly conveyed to me by all the parties, I will be accountable to you for the sum of 3,000 *l.* upon receiving a proper release from

you, and Mr. Wilson.—John King.” The title was perfected and the estate was conveyed to King, and he continued in the undisturbed possession thereof, but refused to account with Kemp for the 3,000 *l.* Kemp and *B.* filed a bill against King, alleging that the 3,000 *l.* was the consideration for Kemp’s equitable interest in the estate, and for his procuring a conveyance of the same to King; that he borrowed money of *B.* on the assignment to him of the above undertaking, and that Wilson was Kemp’s agent. King, by his answer, denied that Kemp had any interest in the said estate, or that he procured the conveyance of it to King, but he said that it was for Wilson’s interest he agreed to give 3,000 *l.*, and that Kemp’s name was used in the undertaking in order to protect Wilson from any claim by his assignees, he being an uncertificated bankrupt; that the dealing was with Wilson, and through him with the vendors of the estate.—Held, in the absence of proof of the allegations in the bill, that certain letters from Wilson to *B.* justified the inference that Kemp was not entitled to any account from King in respect to the undertaking; and the decree dismissing his bill was affirmed with costs.—*Staley v. King*, p. 131.

2. *J. M.* had been *W. L.*’s solicitor and his agent in obtaining money on mortgages and otherwise, and also receiver of the rents of his estates; on a bill filed by *W. L.* against him and the mortgagees a decree was made for a general account against *J. M.*, and for the taxation of his bills of costs, notwithstanding there were settled accounts signed by *W. L.* and securities given by him, and the vouchers delivered up to him. The decree having directed the examination of the parties touching the matters in dispute, *W. L.* and *J. M.* filed interrogatories for their respective examinations; *J. M.* answered, *W. L.* refused to answer, whereupon an affidavit was filed by *J. M.* pursuant to an order of Court, verifying the facts to which his interrogatories were directed.—Held, by the Lords, reversing the decision of the Court of Exchequer, that this affidavit ought to be taken as evidence of the advances of money stated in it as constituting the debt claimed by *J. M.* from *W. L.*, and for which *J. M.* held and produced *W. L.*’s bond.—*Morgan v. Evans*, p. 159.
3. *B.*, a partner and acting director of a joint-stock com-

pany, procured for *S.*, who was not a partner, at his request, some shares in the company's stock, and received from him the purchase-money. *S.* afterwards refused to accept the transfer of the shares, and to pay the instalments that accrued due on them, alleging, as the grounds of his refusal, that he was induced to purchase the shares by *B.*'s false and fraudulent representations, and fraudulent concealment as to the credit and solvency of the company. Upon the trial of an issue directed to ascertain the truth or falsehood of these allegations, several partners in the company were admitted as witnesses for *B.*, and the Court of Session, upon a bill of exceptions, held that they were competent witnesses. The House of Lords affirmed that decision.—*Syme v. Brown*, p. 412.

#### FOREIGN LAW.

*J. Y.*, born in Scotland, but domiciled in England, bought a Scotch estate, paid part of the price, and for the remainder—which was declared to be a lien on the estate—he gave a bond, payable within a given time, if all pre-existing incumbrances affecting the estate should be then discharged. The vendor assigned the bond and real lien to the bank of *L.*, who gave *J. Y.* notice thereof. *J. Y.*, finding that the incumbrances were not discharged at the expiration of the time for payment of the bond, deposited the principal and interest in the Bank of Scotland, and informed the assignees that the money was so consigned, but should be paid to them on producing discharges from the incumbrances. The assignees produced some discharges, and received a proportion of the deposit. The balance remained in the bank, on receipts taken in *J. Y.*'s name, up to the time of his death.

*J. Y.* before his death executed in England several instruments in writing. In a will respecting his Scotch estate, he declared his will to be, that the said receipts of deposit should become the property of certain trustees of that estate, and be endorsed to them by his executors appointed in a will of his English property, the money to remain in deposit until the titles of the estate should be cleared, and then to become the property of the vendors' representatives on payment of the bond. He then made a will respecting his English property, appointing executors, and afterwards cancelled it. He subsequently executed a trust-deed, dis-

posing of his Scotch estate, and therein declared that he had, in a separate will respecting his English property, directed his trustees and executors to endorse the said receipts to the trustees of his Scotch estate. He afterwards made a will disposing of his English property, and thereby gave his goods and chattels, wherever situated, to his nephew, and appointed him his sole executor and residuary legatee. The nephew obtained probate of the will, and claimed thereunder the bank deposit, in a suit instituted in Scotland between him and other claimants.

Held, first, that the Scotch court had a right to look to the first will for discovering the testator's intentions respecting the deposited money; secondly, that, without looking to that will, the trust-deed contained a sufficient declaration of *J. Y.*'s intention to appropriate the money to his trustees for payment of his bond, &c.

Following up the principle that the *lex loci domicilii* governs the distribution of personal estate, the Scotch and all foreign courts are bound, in the interpretation of a testator's written declarations of intention touching his personal estate, situated within the foreign jurisdiction, to adopt the principles of construction applicable to such instruments by the law of the testator's domicile, and that law, being matter of fact, is to be inquired after like other facts; but they are not bound to adopt foreign rules of evidence, every court having its own technical rules of procedure.—*Yates v. Thomson*, p. 544.

GRANT. See MARKET.

Lord Fairfax, by a codicil to his will, in the year 1671, gave all his tithes of Bilborough in fee (subject to an estate therein for the life of *R. S.*) to Henry Fairfax and his heirs and assigns, to the use of a preaching minister there, to be nominated by said *H. F.* and his heirs. The heir of *H. F.* conveyed the tithes with other property to trustees for sale for payment of his debts, and they were accordingly sold and conveyed by the said trustees in 1716 to *R. F.* and *J. H.* and their heirs, on trust as to the tithes to the use of a preaching minister to be nominated by *R. F.* and his heirs. *J. H.* (who was only trustee for *R. F.*) surviving *R. F.*, became seised of the legal estate, and his descendants continued so seised in succession until 1826, when his heir-at-law conveyed the said tithes upon the



original trusts to *T. L. F.*, the heir of *R. F.* *T. L. F.* had in 1721 nominated *B. E.*, the preaching minister of Bilborough.—Held, in a suit by *T. L. F.* and *B. E.* for an account of tithes in Bilborough, that this was a valid nomination of *B. E.*—*Holdsworth v. Fairfax*, p. 115.

**INCUMBRANCES (PRIORITY OF.)** See PRIORITY.

**INFANCY.** See PRACTICE, 4.

**INFERIOR COURT.** See PRACTICE, 5.

**INTEREST.** See VENDOR AND PURCHASER.

*J. M.* having recovered judgments against *W. L.*, upon warrants of attorney which purported to carry interest, and having by decree been made accountable for the rents received from *W. L.*'s estates, with interest, Held, that, under the circumstances, the judgments ought also to carry interest.—*Morgan v. Evans*, p. 159.

**JOINT STOCK COMPANY.** See AWARD, 2. EVIDENCE, 3.

**JURISDICTION.** See PRACTICE.

**LIMITATIONS, STATUTE OF.**

Fraudulent sales had been made by the first tenant for life; his son died in his lifetime; the tenancy for life continued to exist for above 35 years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem.—Held by the Court below, and affirmed by the Lords, that he was not barred by the lapse of time.—*Bandon (Earl) v. Becher*, p. 479.

**MARKET.**

Where a corporation had held a market by prescription, and the Crown afterwards granted to the corporation a charter with these words, "quod nullum mercatum infra septem leucas in circuitu burgi prædicti per nos vel hæredes nostros alieno concedatur:" Held, that such prohibition, if it could be construed to extend beyond that which is attached by the common law to the grant of a market, was void. Held also, that the establishment of a new market, to be holden at the same times within the common law distance of the old market, was *prima facie* injurious to the latter, and therefore void; the convenience of the public would not, under such circumstances, justify the grant of a new market.

And where the first charter purported to be granted "de assensu prælatorum, comitum, &c., in instanti Parlamento

convocato," a new charter granted to hold a market within the described distance would be void, and would be repealable by *scire facias*. The words stated would have the effect of giving the first charter the authority of an Act of Parliament.

Such a charter could only be repealed by Act of Parliament. If the market created by the first charter had not sufficient space for the accommodation of the public; and also, if part of the space originally allotted to it was employed or suffered by the grantee to be employed for other purposes, without his providing as convenient a place for the public to buy and sell in elsewhere within the limits of his grant, such circumstances would furnish a good defence to an action brought by him against any person for selling out of the market; they might also furnish ground for a *scire facias* to repeal the charter.

Quære, whether such circumstances would not render the grantee liable to an indictment for a misdemeanor? If they would, an action would lie against him for his default. But while such grant remained unrepealed, no other market could be granted within the limited distance.

If, by the terms of the grant, the market was to be held in a fixed place defined and known by metes and bounds, should those limits not be sufficient, and the owner of the market have no power to enlarge them, a new market might be granted to such an extent as to supply the deficiency, but no more.—*Islington Market Bill*, p. 513.

**MARRIAGE PORTION.** See DEVISE, 2.

**MARRIAGE SETTLEMENT.**

A deed of settlement was made in contemplation of marriage, and contained a proviso by which the estates, &c., thereby granted, should, in the first place, be charged with certain portions therein mentioned, due to the brothers and sisters of the settlor, and with certain debts set forth in a schedule thereunto annexed. The covenant against incumbrances specially excepted a jointure to the settlor's mother, and the before-mentioned portions and debts; and the covenant for further assurance contained an exception similar to the foregoing, by an express reference to it. The settlor was possessed of other estates besides those settled. The settlor after his marriage paid off some of the portions and some of the debts, and, by his will, declared such payments to

be in case of his settled estate.—Held, by the House of Lords, reversing a decree of the Court of Chancery in Ireland, that all rights must be taken to be as they were established at the date of the conveyance, and therefore neither any directions in the will of the settlor, nor the state of his affairs at his decease, could alter its construction; and consequently, that the debts, &c., continued to stand as a burden on the real estates, and that the personal estates were exonerated in the hands of the executors.—*Fandeleur v. Fandeleur*, p. 62.

By a marriage settlement, certain freehold lands, together with the mansion-house and park of the settlor, were given to trustees to pay to the settlor's wife, if she should survive him, 1,000*l.* a year clear from all deductions whatever. The settlor by his will confirmed the settlement, and gave the mansion-house and park to his wife for life, remainder to his nephew, to whom he also gave his copyhold estates in England and his estates in Pennsylvania, the latter free from all incumbrances whatever; he created two rent-charges, payable out of his real estates in England.—Held, that the devise to the wife of the lands charged by the settlement was not intended to merge the charge in the settlement, and that she was, therefore, entitled to enjoy the mansion-house and park without any deduction being on that account made from the annuity, which was to be raised entirely out of the other English estates held by the nephew.—*Portell v. Grigby*, p. 103.

## POOR.

In a parish comprising a borough and a district of land, the management and maintenance of the poor in the landward district cannot be separate from the management and maintenance of the poor in the borough, but the poor of both must be regarded as the poor of one parish, and indiscriminately entitled to aid from the parish funds. Long usage is of no avail against plain statutory enactments, and it can be binding on parties only as the interpreter of a doubtful law, and as affording a contemporaneous exposition. Where a statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with other express directions of the statute.—*Dunbar (Provost of) v. Roxburghe (Duchess of)*, p. 335.

PRACTICE. *See* APPEAL. AWARD, 2. BANKRUPTCY. COSTS.  
EVIDENCE, 2. INTEREST. PRIORITY OF DEBTS. RECEIVER.

1. Where a decree has been made against a party upon hearing, and he omits to present a petition for rehearing within the limited time, if he afterwards presents a petition complaining of some omissions in the decree, an order made on such petition supplying the omissions is irregular. The proper course would be to file a bill of review.—*Champernonne v. Brooke*, p. 4.
2. The Master having, pursuant to the decree and to subsequent orders in the suit, made his general report, to which no objections were taken, nor exceptions allowed, nor did any error appear on the face of it; Held, that the report could not, by an order made on the hearing for further directions, be sent back by the Master to be reviewed.—*Morgan v. Evans*, p. 159.
3. On appeal and cross appeal, the former being allowed and the latter dismissed, the Lords holding that the Appellant in the appeal ought, as the representative of mortgagees in a suit originally instituted to redeem mortgages, to have had the final decree with costs in the Court below, gave him costs in the cross appeal by way of compensation.—*Id.*, p. 159.
4. A Plaintiff filed a bill in the Court of Exchequer for an account of tithes, and for discovery and relief. The Defendant, being an infant, put in his answer by his guardian. The answer set up an immemorial payment in lieu of tithes, but did not make the required discovery. By the practice of the Court of Exchequer in Equity, the answer of an infant cannot be excepted to for insufficiency. When the Defendant came of age, the Plaintiff filed a supplemental bill against him, alleging the existence of new facts, and praying for discovery and relief.—Held that such bill could be supported.—*Waterford (Marquis) v. Knight*, p. 270.
5. Upon an order remitting a cause to the Court below to take the accounts, &c., but containing no direction in respect to the cost of the appeal, the Court below, exercising its inherent jurisdiction, and holding that the relators should be fully indemnified, ordered payment of their costs of that appeal out of the ascertained balance, which, upon taking the accounts, appeared due from the corpo-

ration, though not paid into Court.—This order was affirmed with costs.—*Dublin (Corporation of) v. The Attorney General of Ireland*, p. 306.

6. The rule with respect to costs in the House of Lords, as in the Privy Council, and in Chancery, is, that one cannot appeal for costs alone, but if an appeal be brought on the merits—not on colourable grounds of appeal, for the purpose of raising the question of costs—the House will not treat that as an appeal for costs, but will even, in affirming the judgment of the Court below, consider the question of costs as fairly raised, and where there is hardship on the Appellant, will reverse so much of the judgment of the Court below as gave costs against him.—*Inglis v. Mansfield*, p. 362.
7. An appeal for mere costs does not lie, yet if an appeal is brought on a substantial question, not colourable, the House may deal with the costs awarded by the Court below. Accordingly, in an appeal which appeared to the House to have been brought for costs, but in which the order appealed from was varied materially, in favour of the Appellant, by the correction of an error, which, however, he might have prevented by a mere suggestion to the Court below, it was Held, that the Appellant is not, on the ground of that variation, entitled to be absolved from costs; but, under the circumstances, the appeal was dismissed without costs.—*M'Aulay v. Adam*, p. 385.
8. G. P. Monck's estate in Ireland—being charged with a jointure for Lady Araminta, his wife, by their marriage settlement, whereby also he covenanted for payment to her of the sum of 300 *l.*, by his heirs, executors or administrators, out of his real or personal estate, immediately after his decease—were, in the year 1777, settled to his own use for life, with remainder to Henry Monck, his eldest son, in fee, subject to a trust term for raising a sum to be applied as by deed or will he should appoint. He died in 1804, having by his will bequeathed, among other things, all rents and arrears of rent due to him to Lady A., her executors and administrators, and he appointed her sole executrix. Lady A. declined to prove the will; Henry Monck obtained letters of administration, with the will annexed, received the rents, &c., and died in 1815, having by his will devised all his real estates to trustees for the use

of his two daughters, their husbands and issue respectively, in strict settlement, subject to a trust term for raising a fund to pay his debts, legacies and annuities; and he thereby directed payment of 200 *l.* a year to Lady A., and her assigns for life, in addition to her jointure; and gave her a legacy of 500 *l.*, payable in twelve months after his decease; and he gave an annuity of 400 *l.* a-year to Ann Monck, his sister, in case she survived Lady A., and upon condition of her releasing his real estates from all claims; and he appointed Lady Elizabeth, his wife, his executrix, who proved the will, and filed a bill in Chancery against Lady A. and Ann Monck, against the testamentary trustees of the last-mentioned term, and of the inheritance of the devised estates, and against the persons beneficially interested therein, praying that the trusts of the will might be carried into execution, and that accounts might be taken of the debts and legacies of the testator, and of the charges affecting the real estates, &c. Lady Araminta, in her answer, claimed to be entitled to receive out of the real estates, in addition to her jointure, the said sum of 300 *l.* with interest from her husband's death; and the said annuity of 200 *l.* and legacy of 500 *l.*, together with all the rents and arrears that were due to G. P. Monck at his death, and a proportionate value of the timber planted by him on the devised estates.—*Monck v. Paget*, p. 430.

The usual decree for an account, &c. having been made in 1818, and Lady A. having died before any further steps were taken in the cause, Ann Monck, her residuary legatee and sole executrix, proved her will and carried in a charge before the Master in pursuance of the decree, and thereby claimed as such executrix the said annuity of 200 *l.* and the legacy of 500 *l.*, omitting the other claims made in Lady A.'s answer; and in her own right she claimed the annuity of 400 *l.*, offering to release the estates of Henry Monck from all other claims. A final decree was made in the cause in 1821, and enrolled in 1822. In 1831 a second suit was instituted for sale of part of the devised estates, and a decree to that effect was made and enrolled in 1832.—*Id.* In 1834 Marcus Monck, the second son of G. P. and Lady A. Monck, having in 1832 obtained administration *de bonis non* to their respective estates, and also to the estate of his sister, Ann Monck, who died in 1830, moved the Master of

the Rolls for leave to prove before the Master in the first cause the unproved demands of Lady A., or to file a supplemental bill, which motion being refused, he then moved the Lord Chancellor for leave to file a supplemental bill, or such other bill as he might be advised. That motion also was refused. Upon appeal from his Lordship's order, the Appellant sought to make a case to prove before the Master, under the decree of 1821, the unproved demands of Lady A., or for a bill of review.—Held by the Lords, without giving any judgment on the merits, that the Lord Chancellor properly refused the motion for leave to file a supplemental bill, and that the appeal was irregular in point of form, in asking for relief which was not asked of the Court below, the order of the Master of the Rolls refusing that relief not being appealed from.—*Monck v. Paget*, p. 430.

9. Where there is an appeal against a decision of a Court of Equity, this House may consent to hear the appeal argued, but will not give judgment till the decree of the Court has been duly enrolled.—*Foster v. Cocherell*, p. 456.

10. Though the Court of Chancery cannot review or correct a decree of the Court of Exchequer, yet where such decree has been obtained collusively and fraudulently, a party whose interests are affected by it, may raise, in the Court of Chancery, either as actor or defender, a question as to its validity.—*Bandon (Earl) v. Becher*, p. 479.

Where sales of estates had fraudulently taken place under decrees of the Court of Exchequer in Ireland, obtained by collusion between the tenant for life, the mortgagee, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been protected in such suits, the Court of Chancery in Ireland, on his coming into possession, granted him relief on a bill filed to redeem. That decree was affirmed by the Lords.—*Id. Ib.*

11. Where there is a statement of a fact in the case presented by the Appellant to this House as the subject of appeal, the Respondent, if he objects to such statement, should apply to have it struck out. If he omits to do so, such fact will be afterwards taken as uncontradicted.—*Turner v. Dickenson*, p. 593.

12. Where the subjects of two appeals are so connected that the case of a party to one of them is affected by the argu-

ments in the other, to which he is not a party, his counsel will be allowed to answer those arguments.—*Phipps v. Ackers*, p. 702.

13. On the day appointed for hearing an appeal, when its competency also was first to be argued by one counsel at a side, pursuant to an order of the House, the Respondent's counsel appeared at the bar, and, no counsel or agent appearing for the Appellant, prayed that the appeal be dismissed. The House required him to open a *prima facie* case against the appeal before they would dismiss it.—*Fraser v. Gordon*, p. 718.

PRINCIPAL AND SURETY. See RECEIVER, 1.

1. Watson undertook by bond jointly and severally with the trustee of a bankrupt estate in Scotland to answer to the extent of 1,000 *l.* that the trustee should faithfully discharge his office, account for his management of the estate, &c. The creditors of the bankrupt, according to the bankrupt law in Scotland, chose commissioners to act for them, and superintend the proceedings of the trustee. The trustee having managed the estate for thirteen years without censure, was, in the fourteenth year, found to have by various contrivances, amounting to fraud, abstracted from the bankrupt estate a large sum, and his accounts were deficient to the amount of 1,008 *l.* The bond being put in suit against Watson, the co-obligor and surety, he pleaded that the commissioners, by neglect and connivance, had caused and permitted the trustee's default, or, knowing it, had concealed it from him, but of this imputation he did not give any proof, and it was denied by the commissioners.—Held, by the Lords, reversing the judgment of the Court below, that the surety was not discharged from his obligation by the alleged neglect of the commissioners in not detecting the fraud and malversation of the trustee.—*Mactaggart v. Watson*, p. 525.
2. *W. M.* and others bound themselves by bond, jointly and severally, to pay to the Bank of Scotland such sums as should be drawn out by *W. M.*, or be due from him, on a cash credit opened by the bank, in his name; and the certificate of the bank accountant was to be held sufficient to ascertain the balance due, and to warrant execution of law for such balance (not exceeding 5,000 *l.*) against the obligors. *W. M.* drew on the bank by orders, written on unstamped



paper, payable to bearer; and though these drafts purported to be issued in the town where the bank was situated, they were in fact drawn and issued at a place more than ten miles distant, and were also post-dated, and the bank agent knew that they were wrong dated in point of place and time. *W. M.*, having become insolvent, was found to owe to the bank on the cash credit account upwards of 4,000 *L.*, as certified by the bank accountant, and for that debt the bank put the bond in suit against his co-obligors.

Held by the Lords (reversing the decree of the Court of Session), that no obligation arose on the bond to pay any balance alleged to be due on drafts so drawn and issued, contrary to the provisions of the Stamp Act, 55 Geo. 3, c. 184, s. 13, which, in addition to penalties on the parties offending, declares, moreover, that a banker shall not be allowed any money paid on such drafts in account against the drawer or his representatives.—*Swan v. Blair*, p. 610.

#### PRIORITY OF DEBTS.

A testator devised his estates to his eldest son, but charged certain of them with legacies to his younger children, specifically charging one of such legacies, amounting to 10,000*L.*, upon one of his estates, and another legacy of 20,000*L.* upon a different estate. He then made other devises and bequests, and directed that a certain house and his residuary property should be sold in payment of his debts, and in ease of his real estates. The legatee of the 10,000*L.* filed a bill to have the trusts of the will declared and executed. Creditors were directed to come in, and the estates specifically charged with payment of the debts were found not sufficient for that purpose. The Court afterwards directed a reference to the Master to take an account of the debts, and that in taking such account he should report the order and priority of such debts and incumbrances, and particularly that he should inquire and report whether any and what sum remained due to the person entitled to the legacy of 20,000*L.*, and the priority thereof. This legacy had been assigned to trustees under a marriage settlement, and they were not parties to the suit, but went in with others upon the reference to the Master. The Master made a report of the amount of the debts, and found that this

legacy was a charge affecting this particular estate, but was only next in priority after the payment of the judgment and bond debts of the testator.—Held, that such finding was right.—*Bouverie v. Norbury* (Earl), p. 247.

#### PRIORITY OF INCUMBRANCE.

1. A second incumbrancer of an equitable interest, by giving notice of his incumbrance to the trustees in whom is vested the legal estate, obtains a priority over a previous incumbrancer who has not given such notice.—*Foster v. Cockerell*, p. 456.
2. *A.* became possessed of a tract of open waste ground called the Lydes. He built houses upon it, and gave the row of houses thus built the name of Somerset-place. There were gardens behind these houses, and a lawn in front, and roads and footpaths connecting them with the roads of the neighbourhood. *A.*, to carry on the building speculation in which he was engaged, borrowed money at different times from *B.*, and occasionally made up accounts of advances and payments, and struck balances, for which he gave different securities. In the year 1808, he gave as a security for the repayment of the money then due, an agreement, whereby he charged certain houses at that time unfinished, “and likewise all and every other the messuages or dwelling-houses, lands, hereditaments, and fee-farm ground rents, also situate and lying in Somerset-place aforesaid, adjoining the said unfinished messuages or dwelling-houses,” with the payment of the sum then found due to *B.*; and he thereby agreed to execute to *B.* “a good and sufficient mortgage of all and every his said messuages or dwelling-houses, lands, hereditaments, and fee-farm or ground rents.” In 1810, *A.* having collected the water from springs on the Lydes into a reservoir, which he formed on the lawn, agreed with certain other persons to supply their houses with water on receiving a compensation “in the nature of a rent issuing out of their premises for ever after, and recoverable in the usual manner by distress and entry.” In 1813 another settlement took place between him and *B.*, and *A.* entered into another agreement with *B.*, in the same terms as the former, for securing payment of the sum then found due to *B.* The title-deeds of the Lydes were then left by *A.* in the hands of *B.*’s solicitor. After all this had been done, a house called the Ivy House



bank agent knew that they were wrong dated in point of place and time. *W. M.*, having become insolvent, was found to owe to the bank on the cash credit account upwards of 4,000 *l.*, as certified by the bank accountant, and for that debt the bank put the bond in suit against his obligors.

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#### TITHES.

1. Evidence of a payment in lieu of tithes was given, extending as far back as the reign of Charles 1. Still more ancient documents relating to the same parish, and among them the Ecclesiastical Survey of Henry 8, made no mention of such payment.—Held, under these circumstances, that the allegation that such payment existed before the time of legal memory, was not supported.—*Graves (Lord) v. Fisher*, p. 1.
2. It appeared from evidence, that the tithes of Bilborough had been appropriated to an alien priory, dissolved by stat. 27 Hen. 8; that Henry 8th afterwards demised them for 21 years, by the description of *omnes decimas garbarum et fieni*; that Edward 6, by letters patent, granted them to *H.* and *W.*, and their heirs, by the description of *omnes illas decimas garbarum, granorum, bladorum, fieni, lane et agnellozum ac alias decimas nostras quascunque*, &c., and that the title to them under that grant was vested in *T. L. F.* and his nominee. There was no mention of rectory or advowson in the grant. There was no trace of any endowment for a vicar or curate at any time in Bilborough.—Held, that the grant included the rectory, and comprised all tithes of every description arising in Bilborough, and the decree ordering an account of them to *T. L. F.* and *B. E.* was affirmed.—*Holdsworth v. Fairfax*, p. 115.
3. The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropiator.—*Andrews v. Drever*, p. 314.

From evidence of right to tithes of all kinds in a lay impropriator up to a given time, and of perception of the corn tithe since that time by another party, a jury may, if it think fit, infer a grant of all the tithes by the first-mentioned impropriator to such latter party, who is therefore at liberty, in support of his right to the hay tithe, to give in evidence leases of that and all other tithes from the presumed grantor.—*Andrews v. Drever*, p. 314.

USAGE. *See* Poor.

#### VENDOR AND PURCHASER.

*Semble* that the purchaser of an estate, the value of which is increased by the wearing of lives, may be called upon to pay interest on the purchase-money in respect of that increased value from the time when he becomes by law entitled to receive the rents and profits.—*Champervorne v. Brooke*, p. 4.

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#### ERRATA.

P. 61, line 11, *for* arrangement *read* argument.

513, line 2 from the bottom, *for* patent *read* charter.

687, line 12 from the bottom, *for* G. H. Ackers *read* J. C. Ackers.

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